IN THE

Supreme Court of the United States

J. L. SPOONS, INC., *et al.*,

Petitioners,

—v.—

HENRY GUZMÁN, DIRECTOR,
OHIO DEPARTMENT OF PUBLIC SAFETY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Sixth Circuit Court of Appeals err in rejecting a First Amendment overbreadth challenge to an Ohio liquor regulation prohibiting live entertainment that contains any semi-nudity or sexually suggestive touching in any performance, including, *inter alia*, plays, dramas, stand-up comedy, satire, musicals, concerts, dance, opera, and ballet at thousands of theaters, playhouses, arenas, concert halls, nightclubs, restaurants and other venues licensed to serve alcohol throughout the state, in a decision:

   A. that conflicts with decisions of the Third, Fourth and Eighth Circuit Courts of Appeals and its own precedent, and

   B. that presents an important issue that the Court did not have an opportunity to reach in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) and *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000)?

2. Did the Sixth Circuit Court of Appeals err when it reversed the judgment of the district court, which had not reached a determination on Petitioners' as-applied challenge to the liquor regulation at issue because of its conclusion that the regulation was unconstitutionally overbroad, without remanding to allow the district court to issue a ruling on Petitioners' as-applied challenge to the regulation?

LIST OF THE PARTIES

The parties to the proceedings in the lower court were J. L. Spoons, Inc.; SSY, Inc.; Entertainment U.S.A. of Cleveland, Inc.; and Buckeye Association of Club Executives as Appellees and Nancy J. Dragani, Acting Director, Ohio Department of Public Safety; Keith McNamara, Chairman, Ohio Liquor Control Commission; Robert A. Gardner, Member, Ohio Liquor Control Commission; and Rocco J. Colonna, Member, Ohio Liquor Control Commission, in their respective official capacities, as Appellants.

Henry Guzmán has since been appointed Director, Ohio Department of Public Safety, and is therefore, substituted as a Respondent in his official capacity, replacing Nancy J. Dragani. *See,* Rule 43(b)(2), *Federal Rules of Appellate Procedure;* Rule 35, *Rules of the Supreme Court of the United States.* Michael Shaheen has since been appointed Chairman of the Ohio Liquor Control Commission and is therefore substituted as a Respondent in his official capacity, replacing Keith McNamara in that capacity. Keith McNamara, formerly Chairman of the Ohio Liquor Control Commission, has since been appointed Vice Chair of the Ohio Liquor Control Commission, and Robert A. Gardner continues as a member of the Ohio Liquor Control Commission, and each are named as Respondents in those official capacities herein. Rocco Colonna is no longer a member of the Ohio Liquor Control Commission.

CORPORATE DISCLOSURE

The corporate parties to this action are: J. L. Spoons, Inc.; SSY, Inc.; Entertainment U.S.A. of Cleveland, Inc.; and Buckeye Association of Club Executives. No publicly traded company owns stock in any of these corporate parties, nor do any of the corporate parties have a parent corporation. Rule 29.6, *Rules of the Supreme Court of the United States.*

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PETITION FOR A WRIT OF CERTIORARI

J. L. Spoons, Inc.; SSY, Inc.; Entertainment U. S. A. of Cleveland, Inc.; and Buckeye Association of Club Executives petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit denying Petitioners' Petition for Rehearing and for Rehearing En Banc is set forth in the Appendix at App. 72-73. The opinion of the court of appeals reported at 538 F.3d 379 (6th Cir. 2008) is set forth at App. 1-28. The memorandum and orders of the United States District Court for the Northern District of Ohio declaring Ohio Administrative Code §4301:1-1-52(A)(2), (B)(2) and (B)(3) unconstitutionally overbroad and permanently enjoining their enforcement is set forth at App. 29-34. The memorandum and order of the district court granting Petitioners' Motion for a Preliminary Injunction, reported at 314 F. Supp.2d 746 (N.D. Ohio 2004) is set forth at App. 35-67. The order of the district court granting Petitioners' Motion for a Temporary Restraining Order is set forth at App. 68-71.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on August 15, 2008. The order of the court denying rehearing and rehearing en banc was entered on December 16, 2008. This petition is being filed within 90 days of the order denying rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution is reprinted in the Appendix to this Petition at App. 74. Ohio Administrative Code §4301:1-1-52(A)(2), (B)(2) and (B)(3) is reprinted at App. 75-77.

STATEMENT OF THE CASE

In more than 12,000 theaters, arenas, concert halls, comedy clubs, nightclubs, restaurants and other venues in Ohio that serve as potential sites for the presentation of live entertainment and are licensed to serve alcohol, the performance of plays, stand-up comedy, satire, musicals, dramatic readings, concerts, ethnic and native dance, operas, ballets and other serious live entertainment containing semi-nudity or sexually suggestive gestures is forbidden.

Salome's veils must be opaque; the protagonists in *Wit, Equus, Hair*, and *The Full Monty* cannot shed their garments–nor wear costumes giving the appearance that they have; the dancers of Les Ballet Africains must wear pasties; and sumo wrestlers must substitute their ceremonial mawashi with trousers that cover their buttocks. The artists performing in *A Streetcar Named Desire, Lolita, Big Bertha* or the tango must censor the movements in their performances to remove caresses or gestures designed to sexually arouse or gratify.

A regulation of the Ohio Liquor Control Commission prohibits nudity and sexually suggestive gestures and conduct in live presentations on premises licensed to sell and serve alcohol. The provisions of the regulation, known as Rule 52, read, in relevant part:

Entertainment-prohibition against improper conduct

(A) Definitions as used in this rule:

(2) "Nudity" means the showing of the human male or female genital, pubic area or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple and/or areola; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum, anal region, or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of the nipples and/or areola.

* * * * * * *

(B) Prohibited activities: no permit holder, his agent, or employee shall knowingly or willfully allow in and upon his licensed permit premises any persons to:

* * * * *

(2) Appear in a state of nudity;

(3) Engage in sexual activity as said term is defined in ORC 2907....

App. 74. "Sexual activity" is defined to mean "sexual conduct or sexual contact, or both." § 2907.01(C), Ohio

Rev. Code. "Sexual contact" means "any touching of an erogenous zone of another, including without limitation [,] the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." § 2907.01(B), Ohio Rev. Code.

Violations of Rule 52 can be punished by suspension of the offender's license, payment of forfeiture in lieu of suspension, or outright revocation of the offender's license.

Ohio is not alone in promulgating regulations that restrict the content of live entertainment. At least thirty-one states in addition to Ohio have enacted statutes or administrative regulations that impose restrictions on live entertainment similar to the way that Ohio has.[1] Myriad

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[1] Alabama (AL ADC 20-X-6-11; Ala. Code, §§ 11-3-27, 13A-12-200.1, 200.11, 130); Alaska (13 AK ADC 104.180); Arizona, (AZ ADC R.19-1-214); Arkansas (ABC Rules and Regulations, Title 3, Subtitle E; ACA §§ 3-5-222, 3-9-306, 5-14-112); California (4 CA ADC §§143.2, 143.3); Colorado (1 CO ADC 203-2); Connecticut (CT ADC §30-6-A24); Florida (F. S. A. §800.03); Georgia (Ga Code Ann. §3-3-41) *held unconstitutional under Georgia's Constitution, Harris v. Entertainment Sys., Inc.,* 259 Ga. 701 (1989); Idaho (I. C. §23-614); Indiana (905 IN ADC 1-16.1-3; IC 35-45-4-1); Kentucky (804 KY ADC 5:060); Louisiana (LSA-R.S. 26:90); Maine (ME ADC 16-226 Ch. 1, §1.13) Maryland (MD Code, Art. 2B, §10-405); Michigan (MI ADC R.436.1409, R.436.1411; M.C.L.A.§436.1916); Minnesota (M.S.A. §617.23); Mississippi (Miss. Code Ann. §67-3-53); Missouri (11 MO ADC 70-2.130; V.A.M.S. 311.710); New Mexico (N.M.S.A. 1978 §§30-9-14, 30-9-14.1); New York (Mckinney's Alcoholic Beverage Control Law §106); Oklahoma (37 Okl. St. Ann. §§ 213.2, 213.2, 537.2); Oregon (O.R.S.§167.062) *held unconstitutional under Oregon's Constitution, State v. Ciancanelli,* 339 Or. 282 (2005); Pennsylvania (40 PA ADC §5.32; 47 P.S. §4-493) *held unconstitutional, Conchatta v. Miller*, 458 F. 3d 258 (3rd Cir. 2006); South Carolina (Code 1976 §§61-4-580, 16-15-365); Tennessee (T.C.A. §39-13-511); Texas (V.T.C.A. Alcoholic Beverage Code §§ 104 01, 11.61,

(continued...)

municipalities and local governments throughout the nation have enacted ordinances limiting nudity and the sexual content of live performances as well.[2]

Federal courts assessing the validity of these regulations have nearly unanimously agreed that restrictions on nudity and sexually suggestive conduct in the presentation of serious theatrical and artistic performances, outside of adult entertainment establishments, offend the First Amendment and must be struck down as overbroad. *Conchatta v. Miller*, 458 F. 3d

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[1](...continued)
61.71); Washington (WA ADC 314-11-050); West Virginia (175 W. Va. Legislative Rules §175-2-5.1.1.b.1.C); Wisconsin (W.S.A. 944.20); Wyoming (W.S. 1977 §6-2-301).

[2] *See e.g., Code of Mansfield, Texas*, § 112.48 (liquor regulation), *Code of Collierville, Tennessee*, §130.046, (ordinance prohibiting nudity in public performance); *Code of South Elgin, Illinois*, §134.01, *et seq.* (public nudity ordinance); *Code of Ionia, Michigan*, §654.01, *et seq.* (ordinance declaring nude dancing establishments nuisances and prohibiting public nudity); *Code of Manchester, New Hampshire*, § 130.11 (liquor regulation); *Code of Windsor, Connecticut*, §11-111, *et seq.* (public nudity ordinance); *Code of Sharon, Pennsylvania*, §666.02 (public nudity ordinance); *Rules and Regulations of the Board of License Commissioners, Montgomery County, Maryland*, §§6.13, 6.15 (liquor regulation); *Code of Ashland, Virginia*, §12-8-9 (public nudity ordinance); *Code of Holden Beach, North Carolina*, §130.04 (public nudity ordinance), *Code of Independence, Kentucky*, §132.02 *et seq.* (public nudity ordinance); *Code of Melbourne Beach, Florida*, §§61-2, 61-3 (liquor regulation); *Code of Nevada, Iowa*, §§40.01, 40.07 (liquor regulation), *Code of Greenfield, Minnesota*, §111.04 (liquor regulation); *Code of Spearfish, South Dakota*, §11-1 (public nudity ordinance); *Code of North Platte, Nebraska*, §116.25 (liquor regulation); *Code of Durant, Oklahoma*, §111.031 (liquor regulation); *Code of Anitoch, California*, §5-18.01 (public nudity ordinance); *Code of Idaho Falls, Idaho*, §§ 4-16-2, 4-16-25 (ordinance prohibiting nudity in live entertainment); *Code of Unalaska, Alaska*, §13.14.010 (public nudity ordinance).

258 (3rd Cir. 2006); *Giovani Carandola, Ltd. v. Bason*, 303 F. 3d 507, 516 (4th Cir. 2002); *Ways v. City of Lincoln*, 274 F. 3d 514 (8th Cir. 2001). *See also, J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 366 (5th Cir. 1998); *Schulz v. City of Cumberland* 228 F.3d 831, 849-50 (7th Cir. 2000).

The lone dissenter to this consensus–in an opinion that executed an abrupt about-face from three of its own prior decisions–is the Sixth Circuit. App. 1-28; *J. L. Spoons, Inc. v. Dragani*, 538 F.3d 379 (6th Cir. 2008). In the face of a record establishing that Ohio's regulation prohibiting semi-nudity and sexually suggestive gestures applies "evenly and equally to all [liquor] permit holders in the State of Ohio," and does not exclude "legitimate high culture theater," the court below found the regulation, nevertheless, passed constitutional muster. App. 14.

Proceedings in the District Court

In 2004, the Defendants, in response to an earlier ruling by the district court that Ohio's liquor regulation placing restrictions on the presentation of live entertainment was unconstitutional,[3] revised the regulation and began plans to enforce it. Plaintiffs, J. L. Spoons, Inc.; Entertainment U.S.A. of Cleveland, Inc.; and SSY, Inc. hold liquor permits and operate gentlemen's clubs where live adult entertainment is presented; Buckeye Association of Club Executives is an association of club owners throughout the state who similarly present live adult entertainment. Plaintiffs filed suit on February 17, 2004 seeking injunctive relief against enforcement of the new restrictions on the ground that they were

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[3] The former version of Rule 52 had been declared unconstitutional and its operation enjoined. *J. L. Spoons, Inc. v. O'Connor*, 194 F. R. D. 589 (N.D. Ohio 2000); the Rule at issue here is a revised version.

unconstitutional on their face and as applied under the First Amendment. 28 U.S.C. §§ 1331, 1343(a)(3) and (4), 2201, and 2202 and 42 U.S.C. §§ 1983 and 1988.

The court granted Plaintiffs' Motion for a Temporary Restraining Order, App. 68-71 and, three weeks later, convened a hearing on their Motion for a Preliminary Injunction.

At the hearing, Plaintiffs presented the testimony of Judith Lynn Hanna, Ph.D., an anthropologist whose discipline of study focuses on dance as a means of non-verbal communication, in support of their facial overbreadth challenge. Dr. Hanna described the expressive elements of dance–both exotic and otherwise, its grammar, vocabulary and meaning and the messages it communicates. *Transcript of Proceedings,* March 11, 2004, pp. 8-10. She testified that Ohio's liquor regulation "would certainly eliminate and restrict a number of performances in ballet, in theater, in ice skating, in performance art" and specifically identified examples of performances that would be eliminated or restricted by Rule 52, including the ballets, *Prodigal Son, Mutations* and *Fuga;* the musical, *Hair*; the modern dance, *Big Bertha*; and the dramas, *A Streetcar Named Desire, Equus* and *Buried Child. Id.* at 25-27.

Plaintiffs also presented the testimony of Daniel Linz, Ph.D. regarding his review and analysis of adverse secondary effects that allegedly attend adult entertainment, in support of their as-applied challenge to Rule 52. Dr. Linz testified extensively about a four-city study he conducted in Ohio as well as several others that examined the relationship between alcohol-serving cabarets that feature adult entertainment and adverse secondary effects, *id.* at 67, and his conclusions that the

data simply did not support the purported rationale of addressing adverse secondary effects caused by adult entertainment on which Defendants claimed that Rule 52 was bottomed. *Id.* at 133.

In support of their case, Defendants presented the testimony of Scott Pohlman, Ohio's Assistant Deputy Director of Public Safety.

Mr. Pohlman, on cross-examination, testified about Rule 52's breadth and reach:

> Q. It applies to every single one of those 24,000[4] permit holders, correct?
>
> A. That's correct.
>
> Q. And that includes bars throughout the State of Ohio, correct?
>
> A. Yes.
>
> Q. It includes taverns that have liquor permits?
>
> A. Yes.
>
> Q. Rule 52 applies to every restaurant in the State of Ohio that has a liquor permit?
>
> A. Correct.

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[4] Defendants testified that about one-half of the 24,000 permit holders were carry-out stores where live entertainment would not be presented. *Id.* at 218.

Q. It applies to every nightclub in the State of Ohio that has a liquor permit?

A. Yes.

Q. And it actually applies, if you read it, to every theater in the State of Ohio that has a liquor permit, doesn't it?

A. That's correct.

Q. And it applies to every hotel in the State of Ohio that has a liquor permit?

A. Yes.

Q. And every convention center?

A. Yes.

Q. And every private club, country club, for example, that has a liquor permit?

A. Yes.

Q. And every arena in the State of Ohio that has a liquor permit?

A. Correct.

Q. And every stadium?

A. Correct.

Q. Every comedy club that has a liquor permit, correct?

A. Correct.

Q. Every concert hall in the State of Ohio that has a liquor permit?

A. Correct.

Q. Every playhouse that has a liquor permit?

A. Correct.

Q. Every dinner theater that has a liquor permit, Rule 52 applies, doesn't it?

A. Yes.

Q. Any ballet house that has a liquor permit, Rule 52 applies, doesn't it?

A. Yes.

Q. Any museum that has a liquor permit?

A. Yes.

Id. at 189-91.

Defendants testified that of the 24,000 permit holders in Ohio, about half are carry-out stores. *Id.* at 218. The remaining 12,000 are, therefore, potential venues for the presentation of live entertainment. Dramatic theater, concerts, ballets, satire, comedy routines and other performances presented at the Palace Theater, Cleveland Museum of Art, Nautica Pavilion, the Cleveland Playhouse, the Great Lakes Science Center, Hilarities Comedy Club, the Akron Civic Theater, the Beachland Ballroom–to name

just a sampling of venues–are all subject to Rule 52's restrictions. *Id.* at 258-61.

Of those 12,000 permit holders, only about 200–or 1.6% of establishments constituting potential live entertainment venues–are adult entertainment establishments. *Id.* at 200. Rule 52, however, is not confined to adult entertainment venues.

The Executive Director of the Ohio Liquor Control Commission acknowledged that the Commission had, in fact, issued a citation for a violation of a prior version of Rule 52 in connection with a presentation of the avant garde theatrical revue, *Oh! Calcutta! Id.* at 225.

Indeed, the Executive Director testified that Rule 52's prohibitions applied to serious, mainstream artistic performances presented in theaters, concert halls and other like venues licensed to serve alcohol, because:

> It would be impossible to have a rule that would make sense if you had exceptions for all sorts of things....

Id. at 290-91.

Following the evidentiary hearing, the court issued a thorough and thoughtful opinion granting Plaintiffs' Motion for a Preliminary Injunction, finding Rule 52 to be unconstitutionally overbroad, relying, *inter alia*, on the Sixth Circuit's decision in *Triplett Grille v. City of Akron*, 40 F. 3d 129 (6th Cir. 1994). App. 35-67. The court also noted the persuasive evidence presented by Plaintiffs challenging the rationale of Rule 52 as a regulation of adverse secondary effects on their as-applied challenge, but determined that it need not resolve the as-applied

challenge, given its determination that Rule 52 was unconstitutionally overbroad. App. 53.

On June 28, 2004, the court held a hearing on Plaintiffs' request for permanent injunctive relief at which the Defendants presented the testimony of one additional witness, John E. Duvall, the Deputy Director of the Ohio Department of Public Safety Unit.

The Deputy Director confirmed Rule 52's broad reach and acknowledged its potential to chill expression. Mr. Duvall testified:

> Q. [B]ut you would agree that the Ohio Theater, if it knew that this rule was going to be enforced, and it read the rule, it would certainly discover that the language of the rule forbids it from presenting an artistic performance that has a fleeting scene involving the exposure of a woman's areola and nipple, correct?
>
> A. Correct.
>
> Q. And so if they wanted to be safe, they would refrain from presenting that particular performance, correct?
>
> A. Among other things, yes.
>
> Q. Now, the same is true with respect to the prohibition upon engaging in sexual activity as the term is defined in Chapter 2907 of the Ohio Revised Code, correct?
>
> A. Correct.

* * * * * *

Q. And you're familiar with the definition of sexual contact; are you not?

A. Yes.

Q. That means the touching of the erogenous zone of another, including, without limitation, the thigh and other body parts for purpose of sexual arousal or gratifying either person?

A. Correct.

Q. And so if someone were to simply read the rule, if the 24,000 permit holders were to read the rule that was recently promulgated to find out what obligation it imposes upon them, that's one of the things you would read, correct?

A. The elements of the crime, correct.

Q. And they would know that if they permitted that kind of touching on their premises of the erogenous zone, such as a thigh, under the circumstances, that they would be at risk of having their liquor permit either revoked, suspended or paying a fine, correct?

A. If it met the elements of sexual arousal of either participant.

Q. Right. So they would know they better

not present the performance that would be so interpreted or else they risk the possibility that they could be punished, correct?

A. They could interpret it that way, yes.

Q. Well, isn't that what this language says to them?

A. Yes.

Q. Okay. And you certainly would encourage all of the citizens to read and follow the rules of the Liquor Commission; do you not?

A. Yes.

Q. You don't tell them that they get to decide for themselves and pick and choose which rules they want to comply with and which ones they don't, do you?

A. No.

Q. In fact, they're the ones who take the risk if they ignore the prohibitions in Rule 52, in the hope that they can convince somebody somewhere down the road not to punish them, the ones who take the risk, correct?

A. Correct.

Q. And you wouldn't tell them to go ahead

and take that risk, would you?

A. Would I personally, no.

Transcript of Proceedings, June 28, 2004, at 37-39.

The court issued a Memorandum and Order on January 3, 2007 adopting the analysis in its Memorandum and Order granting Plaintiffs' Motion for a Preliminary Injunction, declaring Ohio Administrative Code § 4301:1-1-52 (A)(2), (B)(2) and (B)(3) unconstitutionally overbroad, and permanently enjoining their enforcement, relying again on *Triplett Grille* and also on *Odle v. Decatur County, Tenn.*, 421 F. 3d 386 (6th Cir. 2005), a decision of the Sixth Circuit decided after issuance of the preliminary injunction, striking down a county ordinance similar to Rule 52, on overbreadth grounds. App. 29-34.

The Sixth Circuit Appeal

Defendants appealed to the Court of Appeals for the Sixth Circuit. In a split decision, the court reversed the district court's holding that the liquor regulation was unconstitutionally overbroad. Dismissing its own prior precedent declaring similar restrictions on live entertainment to be unconstitutional as distinguishable and non-controlling[5] and failing to acknowledge, much less discuss, the precedent of the Third, Fourth and Eighth Circuits finding similar regulations to be

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[5] *Triplett Grille v. City of Akron*, 40 F. 3d 129 (6th Cir. 1994); *Odle v. Decatur County, Tenn.*, 421 F. 3d 386 (6th Cir. 2005); *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644 (6th Cir. 2007).

unconstitutionally overbroad,[6] the majority determined that the effect of the regulation on legitimate theater was "incidental" and that the "strong medicine" of the overbreadth doctrine was not warranted. App. 11; 538 F.3d at 385.

> The dissent disagreed. Judge Cole wrote:
>
> > [T]hese two provisions prohibit on licensed premises any live entertainment that contains even a brief scene involving simulated nudity or the touching of an erogenous zone, even if the nudity or touching is integral to the narrative of the performance and even if alcoholic beverages are not being served during the actual performance.

App. 18; 538 F.3d at 388. The dissent, quoting *Schad v. Borough of Mt. Ephraim,* 452 U.S. 61,65 (1981) and *National Endowment for the Arts v. Finley,* 524 U.S. 569, 603 (1998), found that Rule 52 applied to "a variety of 'live entertainment, such as musical and dramatic works'...that are entitled to the full protection of the First Amendment" and that it burdened these works "without any justification." App. 18-19,22; 538 F. 3d at 389, 390.

Noting that "the majority has set itself apart from nearly every other court to consider an overbreadth challenge to a similar statute or regulation," the dissent concluded that Rule 52 "fits squarely in ... [the] category" of a government regulation of constitutionally protected speech that should prompt "loud alarm bells ...[to]

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[6] *Conchatta v. Miller,* 458 F. 3d 258 (3rd Cir. 2006); *Giovani Carandola, Ltd. v. Bason,* 303 F. 3d 507, 516 (4th Cir. 2002); *Ways v. City of Lincoln,* 274 F. 3d 514 (8th Cir. 2001).

soundoff in our heads." App. 28; 538 F. 3d at 392-93.

REASONS FOR GRANTING THE WRIT

I. **THE SIXTH CIRCUIT'S HOLDING THAT OHIO'S LIQUOR REGULATION–PROHIBITING SEMI-NUDITY OR SEXUALLY SUGGESTIVE GESTURES IN LIVE ENTERTAINMENT PRESENTED IN ANY THEATER, CONCERT HALL OR OTHER VENUE THAT HAS A LIQUOR PERMIT–IS NOT UNCONSTITUTIONALLY OVERBROAD, CONFLICTS WITH THE DECISION OF EACH CIRCUIT COURT OF APPEALS THAT HAS EVALUATED THE CONSTITUTIONALITY OF SIMILAR REGULATIONS AND ITS OWN PRIOR DECISIONS UNDER THE OVERBREADTH DOCTRINE.** *Conchatta v. Miller*, 458 F. 3d 258 (3rd Cir. 2006); *Giovani Carandola, Ltd. v. Bason*, 303 F. 3d 507 (4th Cir. 2002); *Ways v. City of Lincoln*, 274 F. 3d 514 (8th Cir. 2001); *See also, J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 366 (5th Cir. 1998); *Schulz v. City of Cumberland*, 228 F.3d 831, 849-50 (7th Cir. 2000); *Triplett Grille v. City of Akron*, 40 F. 3d 129 (6th Cir. 1994); *Odle v. Decatur County, Tenn.*, 421 F. 3d 386 (6th Cir. 2005); *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644 (6th Cir. 2007).

A. The Decision Below Conflicts with Those of the Third, Fourth and Eighth Circuit Courts of Appeals.

The Sixth Circuit's opinion directly conflicts with decisions reached by the Third, Fourth and Eighth Circuit Courts of Appeals. *Conchatta v. Miller*, 458 F. 3d 258 (3rd Cir. 2006); *Giovani Carandola, Ltd. v. Bason*, 303 F. 3d 507 (4th Cir. 2002); and *Ways v. City of Lincoln*, 274 F. 3d 514

(8th Cir. 2001).[7]

In *Conchatta*, the Third Circuit evaluated the constitutionality of a statutory provision of the Pennsylvania Liquor Code and its implementing regulation that prohibited "lewd" entertainment, which had been construed to include prohibitions on nudity and sexually suggestive touching. 458 F.3d at 261, 266.

The Pennsylvania liquor regulations applied to some 15,000 to 18,000 establishments, including dinner theaters, comedy clubs and other venues that presented live entertainment. *Id.* at 265-66. Consequently, the challenged provisions in *Conchatta* applied to plays, musicals, concerts, political satires, comedies, ballets, dramas and the like, as Rule 52 does here. *Id.* at 266. The Third Circuit concluded that the liquor regulations were unconstitutionally overbroad. *Id.*

The court in *Conchatta* explained that "[w]ith respect to ordinary theater and ballet performances, concerts and other similar forms of entertainment," Pennsylvania had provided no evidence that nudity or "lewd" conduct created harmful secondary effects–the grounds arguably

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[7] It also conflicts with a number of district court decisions. *See, Eggert Group, L.L.C. v. Town of Harrison,* 372 F. Supp. 2d 1123 (E.D. Wis. 2005) (finding liquor ordinance to be unconstitutionally overbroad); *Kraimer v. City of Schofield,* 342 F. Supp. 2d 807 (W.D. Wis. 2004) (same); *Clarkson v. Town of Florence,* 198 F. Supp. 2d 997 (E.D. Wis.2002) (same); *Nite Moves Entertainment, Inc. v. City of Boise,* 153 F. Supp. 2d. 1198 (D. Idaho 2001) (finding public nudity ordinance to be unconstitutionally overbroad); *Tolbert v. City of Memphis,* 568 F. Supp. 1285 (D. C. Tenn. 1983) (same); *Le v. City of Citrus Heights,* 1999 WL 420158 (E.D. Ca. 1999) (finding ordinance prohibiting sexually suggestive gestures to be unconstitutionally overbroad).

justifying such regulations' application to adult entertainment establishments–when presented in performances at "artistic, theatrical and non-adult entertainment venues." *Id.* at 266, 268.

As noted above, the court emphasized that its determination that the liquor regulations were overbroad, was premised on the assumption that"lewd entertainment" proscribed no more than nudity or sexual touching. The court wrote:

> We need not here predict, however, how expansively the Pennsylvania courts might construe the prohibition because we conclude, in light of the broad array of forms of entertainment to which the prohibition is applicable, that even assuming the Challenged Provisions proscribe no more than entertainment involving nudity or genital touching, those Provisions are unconstitutionally overbroad.

Id. at 266.

The Fourth Circuit reached the same conclusion in *Carandola* on similar facts. At issue in *Carandola* was a provision of the state liquor code–North Carolina's–and an implementing administrative rule that prohibited among other things:

> entertainment by any person whose private parts are exposed or who is wearing transparent clothing that reveals the private parts....
>
> * * * * * * *
>
> entertainment that includes or simulates sexual

> intercourse or any other sexual act;
>
> * * * * * * *
>
> the touching, caressing, or fondling of the breasts, buttocks, anus, vulva, or genitals;
>
> the display of the pubic hair, anus, vulva or genitals.

303 F.3d at 510.

Like Rule 52, North Carolina's liquor regulations applied to all permit holders and swept "far beyond bars and nude dancing establishments." *Id.* at 516. They applied to "a political satire, a Shakespeare play depicting young love, or a drama depicting the horrors of rape....the Pulitzer Prize winning play, *Wit*....and other mainstream entertainment, including popular and award-winning musicals such as *Cabaret, Chicago, Contact,* and *The Full Monty* and most kind of jazz and flamenco dance." *Id.*

Therefore, the Fourth Circuit affirmed the district court's finding that North Carolina's liquor regulations were unconstitutionally overbroad. *Id.* at 520.

Ironically, both the Third and Fourth Circuit Courts, in reaching their conclusions that the liquor regulations at issue before them were unconstitutionally overbroad, relied on the reasoning of Sixth Circuit precedent, dismissed here by the panel as "non-controlling." *Conchatta,* 458 F.3d at 268, *citing Triplett Grille v. City of Akron,* 40 F. 3d 129 (6th Cir. 1994); *Odle v. Decatur County, Tenn.*421 F. 3d 386 (6th Cir. 2005); *Carandola,* 303 F.3d at 518, *citing Triplett Grille.*

The decision of the court below is also at odds with the precedent of the Eighth Circuit Court of Appeals. In *Ways*, the Eighth Circuit affirmed the district court's conclusion that a city ordinance was unconstitutionally overbroad when it prohibited a performer from engaging in "intentional touching of a person's sexual organ, buttocks or breasts, whether covered or not, or kissing, when such contact [could] be construed as being for the purpose of sexual arousal or gratification of either party or any observer." 274 F.3d at 516.

Like the Third and Fourth Circuit Courts, the Eighth Circuit found that because the city ordinance was not confined to adult entertainment establishments, but included "theater performances, ballet performances, and many other kinds of live entertainment" and could be enforced to prohibit "stage actors from kissing and ballet dancers or ice skaters from lifting each other by the buttocks, if such acts could 'reasonably be construed' to be for the 'sexual arousal or gratification' of any observer or performer," the ordinance was unconstitutionally overbroad. *Id.* at 518-19.

The Sixth Circuit's decision here irreconcilably clashes with the decisions of her sister circuits.[8]

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[8] Additionally, the Sixth Circuit's decision here cannot be harmonized with the Seventh Circuit's decision in *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000), in which the court found that the ordinance at issue was susceptible to a limiting construction that confined its reach to adult entertainment establishments, thus saving it from fatal overbreadth. *Id.* at 849-50. *See also, J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 366 (5th Cir. 1998) (finding that public nudity ordinance's exemption of persons "engaged in expressing a matter of serious literary, artistic, scientific or political value" confined its scope sufficiently to comport with constitutional

(continued...)

B. The Sixth Circuit's Decision Also Conflicts with Its Own Precedent.

In two decisions prior to the decision at issue here, the Sixth Circuit had reviewed regulations of nudity in the presentation of live entertainment, similar to the regulation at issue here, and found them unconstitutional under the overbreadth doctrine. *Triplett Grille v. City of Akron*, 40 F. 3d 129 (6th Cir. 1994); *Odle v. Decatur County, Tenn.*,421 F. 3d 386 (6th Cir. 2005); *See also, Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644 (6th Cir. 2007).

Triplett Grille involved a challenge by a nude dancing establishment to the constitutionality of an Akron, Ohio ordinance that prohibited nudity in a public place. 40 F.3d at 131. The district court in *Triplett Grille* struck down the Akron ordinance as applied to nude dancing and also held that it was unconstitutionally overbroad because it prohibited "a broad range of expressive conduct" not associated with harmful secondary effects. *Id.* at 133.

On appeal, the Sixth Circuit rejected the plaintiff's as-applied challenge to the ordinance and held that there was sufficient evidence in the record to support the conclusion that the ordinance targeted adverse secondary effects. *Id.* at 135. The court went on to hold, however, that the ordinance was unconstitutionally overbroad, stating:

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[8](...continued)
mandates.); *Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074, 1079 (4th Cir. 2006) (*Carandola II)* (finding that amendment to statutory liquor regulation's prohibition of nudity and sexually suggestive gesture exempting "theaters, concert halls, art centers, museums, or similar establishments devoted to the arts or theatrical performances" in response to *Giovani Carandola, Ltd. v. Bason*, 303 F. 3d 507 (4th Cir. 2002) (*Carandola I)* cured regulation's unconstitutional overbreadth.)

> Because the City has failed to demonstrate a link between nudity in non-adult entertainment and secondary effects, we do agree with the district court that the Akron ordinance must be struck down as facially unconstitutional under the First Amendment overbreadth doctrine.

Id. at 135. The court described the ordinance's unconstitutional reach and effect:

> The Akron public indecency ordinance at issue here prohibits all public nudity, including live performances with serious literary, artistic, or political value. The ordinance makes no attempt to regulate only those expressive activities associated with harmful secondary effects and includes no limiting provisions. Instead, Akron's wide ban on public nudity sweeps within its ambit expressive conduct not generally associated with prostitution, sexual assault, or other crimes.

Id. at 136. The Sixth Circuit concluded in *Triplett Grille*:

> Because the City failed to present evidence linking expressive nudity in "high-culture" entertainment to harmful secondary effects, we conclude that the ordinance infringes speech protected by the First Amendment.

Id.

Nine years later, in *Odle*, the Sixth Circuit struck down an ordinance prohibiting nudity and sexually suggestive gestures in places where liquor was offered for sale or served, in consonance with *Triplett Grille*:

> We invalidated a similar "public place" ordinance in *Triplett Grille* on the ground that it was overbroad....The ordinance in *Triplett* defined "public place" more broadly than the ordinance at issue in this case, however, because it did not apply only to public places where intoxicating liquors were sold, served, or consumed. We explain later why *Triplett* is relevant despite this distinction. The other differences between the two ordinances are minimal and we think immaterial because, like the *Triplett* ordinance, the county's ordinance reaches a wide swath of public places likely to present performances not usually attended by harmful secondary effects.

421 F.3d at 395. The court in *Odle* also quoted extensively and with approval the Fourth Circuit's decision in *Giovani Carandola, Ltd. v. Bason*, 303 F. 3d 507 (4th Cir. 2002), striking down a liquor regulation restricting live entertainment as overbroad. *Id.* *See* pp. 19-20, above.

Adhering to *Triplett Grille*'s and *Carandola*'s overbreadth analysis, the Court in *Odle* found the Tennessee ordinance to be unconstitutionally overbroad:

> Like the statute in *Carandola* and the ordinance in *Triplett*, the ordinance at issue here "makes no attempt to regulate only those expressive activities associated with harmful secondary effects and includes no limiting provisions. Instead, [it] sweeps within its ambit expressive conduct not generally associated with" the kinds of harmful secondary effects it was designed to prevent. *Triplett*, 40 F.3d at 129; *see also Carandola*, 303 F.3d at 516; *Ways*, 274 F.3d at 518-19. Therefore, the ordinance "reaches a

> substantial number of impermissible applications." [*New York v.*] *Ferber*, 458 U.S. [747] at 771, 102 S.Ct. 3348 [(1982)]; *Broadrick* [*v. Oklahoma*], 413 U.S. [601] at 613, 93 S.Ct. 2908 [(1973)]. Accordingly, we hold that the ordinance is overbroad.

Id. at 399.

In *Hamilton's Bogarts,* 501 F.3d at 654, the court confirmed the vitality of its decisions in *Triplett Grille* and *Odle*.

> Plaintiffs raise two final arguments, that the Rules are impermissibly overbroad in violation of the First Amendment and that the district court improperly balanced the harms to them and to the public against those of the government in denying them a preliminary injunction. While we note that plaintiffs'(*sic*) appear to have a stronger case for overbreadth than even the plaintiffs in *Odle* and *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir.1994), ***where we held the statutes at issue would proscribe expressive conduct in theatrical and other types of performances which there is no reason to believe had any negative secondary effects and were therefore impermissibly overbroad***, it is not necessary for us to engage in an in-depth analysis of plaintiffs' overbreadth and balancing of the harms arguments in light of our holding above.

(Emphasis added).

Despite the clarity of its own binding precedents, the

Sixth Circuit declined to follow them in this case.[9]

First, the court below attempted to distinguish *Triplett Grille* on the ground that Akron City council had enacted its ordinance in response to "constituents' moral outrage toward nude dancing, not concern over [its] negative secondary effects." App. 12; 538 F.3d at 385. But as explained above, that basis was ***expressly rejected*** by the Sixth Circuit in *Triplett Grille* as support for the district court's finding that Akron's ordinance was unconstitutional–specifically ruling that the district court had erred in finding as such. 40 F.3d at 134. The court in *Triplett Grille*, in fact, determined that there ***was*** sufficient evidence in the record suggesting that the ordinance was enacted "to prevent the occurrence of harmful secondary effects." 40 F.3d at 135.

Triplett Grille struck down the Akron ordinance because, like Rule 52, its restrictions applied to non-adult, "high culture" entertainment that had no link to negative secondary effects. The court directly stated:

> Because the City has failed to demonstrate a link between nudity in non-adult entertainment and secondary effects, we do agree with the district court that the Akron ordinance ***must be struck down as facially unconstitutional under the First***

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[9] Sixth Circuit rules provide that only the court sitting en banc can overrule a reported panel decision; reported panel decisions are binding on subsequent panels. *See*, Rule 206(c), *Rules of the Sixth Circuit*. ("Reported panel decisions are binding on subsequent panels.") *See also, Salmi v. Sec'y of Health & Human Services*, 774 F.2d 685, 689 (6th Cir. 1985); *ABX Air, Inc. v. Airline Professionals Ass'n*, 266 F.3d 392, 399 (6th Cir. 2001); *Cone v. Bell*, 492 F.3d 743, 758 (6th Cir. 2007).

Amendment overbreadth doctrine.

Id. (Emphasis added).

The court below also attempted to distinguish *Triplett Grille* on the basis that the regulation at issue in *Triplett* banned "***all*** public nudity in ***all*** public places." App. 13; 538 F.3d at 385. (Emphasis in original). Rule 52, it explained, "bans public nudity only in establishments licensed to sell liquor"–making it "much less restrictive" and covering much less speech than in *Triplett Grille*. App. 13; 538 F.3d 385-86. That distinction, however, had been rejected by the court in its decision in *Odle*, 421 F.3d at 399, as well as in *Hamilton's Bogarts*.

Additionally, the court below suggested that *Triplett Grille* had lost its potency because it "exclusively relied" on Justice Souter's concurrence in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), which, it contended, was ultimately "rejected" by the Supreme Court in *City of Erie v. Pap's AM*, 529 U.S. 277 (2000) when the Court determined that the proponent of a regulation of expression "did not need to carry out ***any*** study documenting secondary effects." App. 13; 538 F.3d at 386. (Emphasis in original).

The Sixth Circuit was just flat out wrong on this point. Justice Souter, in *Barnes*, did ***not*** find that a proponent of a regulation of expression had to support it with an evidentiary record establishing harmful secondary effects; in fact, he determined precisely the opposite in *Barnes*. He clearly and unequivocally explained as such in his concurrence/dissent in *Pap's*:

> Careful readers, and not just those on the Erie City Council, will of course realize that my partial

> dissent ***rests on a demand for an evidentiary basis that I failed to make when I concurred in Barnes, supra***. I should have demanded the evidence then, too, and my mistake calls to mind Justice Jackson's foolproof explanation of a lapse of his own, when he quoted Samuel Johnson, "'Ignorance, sir, Ignorance.'"

Pap's, 529 U.S. at 316. (Souter, J., concurring in part, dissenting in part)(Emphasis added).

Justice Souter's concurrence in *Barnes*, in fact, stands for the exact proposition for which the court below cited *Pap's*. And the Sixth Circuit adhered to that very approach when it rejected the district court's finding that the Akron ordinance was unconstitutional as applied in *Triplett Grille*.[10]

Here, like the regulations at issue in *Triplett Grille*, *Odle* and *Hamilton's Bogarts*, Rule 52's restrictions apply to serious, artistic works that are in no way linked to adverse secondary effects. The Sixth Circuit's decision that Rule 52 is constitutional, not only conflicts with the decisions of its sister circuits, but cannot be reconciled with its own precedent.

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[10] Indeed, the court wrote: "By requiring affirmative evidence of a secondary effects motivation, the district court imposes a burden on the City that Justice Souter's opinion seems designed to avoid." 40 F. 3d at 135. The court in *Triplett Grille* concluded:

> Given the language of Justice Souter's opinion, the evidence presented at trial, and the requirement of judicial fealty to the result reached by the Supreme Court in *Barnes*, the district court erred in concluding that the Akron ordinance was unconstitutional as applied because it was not enacted to combat secondary effects of adult entertainment.

II. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY, NOT AFFORDED TO IT IN *BARNES v. GLEN THEATRE, INC.*, 501 U.S. 560 (1991) AND *CITY OF ERIE v. PAP'S A.M.*, 529 U.S. 277 (2000), TO DECIDE ISSUES OF OVERBREADTH RAISED BY A REGULATION PROHIBITING EXPRESSIVE NUDITY.

Twice before, this Court has granted certiorari to evaluate the constitutionality of regulations restricting the presentation of nude dancing. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277(2000). Both decisions affirmed the premise that nude dancing is entitled to some protection under the First Amendment. Each decision, however, was decided by a fractured Court, with multiple opinions, none of which commanded a majority of five, in addressing the requisite justification for a regulation of such expression under the Constitution.[11]

In neither *Barnes* nor *Pap's*, however, was this Court afforded the opportunity to consider and analyze the regulation of expressive nudity under the overbreadth doctrine.

Justice Souter's concurrence in *Barnes*–stating the

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[11] The plurality opinion in *Barnes* was written by Chief Justice Rehnquist and joined by Justices O'Connor and Kennedy. Justices Scalia and Souter each wrote separate concurrences, while Justice White, joined by Justices Marshall, Blackmun and Stevens dissented. In *Pap's*, Justice O'Connor wrote the plurality opinion evaluating the constitutionality of Erie, Pennsylvania's ordinance regulating nude dancing. Chief Justice Rehnquist and Justices Breyer and Kennedy joined in that opinion. Justice Scalia concurred, joined by Justice Thomas. Justice Souter concurred in part and dissented in part, and Justice Stevens dissented, joined by Justice Ginsburg.

narrowest ground supporting the judgment and thus serving as the controlling opinion of the Court under *Marks v. United States,* 430 U.S. 188, 193 (1977)–found that the State's interest in preventing adverse effects secondary to nude dancing was sufficient under intermediate scrutiny to justify such regulation. 501 U.S. at 587. The Indiana statute was therefore upheld as constitutional as applied to nude dancing.

Importantly, however, Justice Souter noted: "Because there is no overbreadth challenge before us, we are not called upon to decide whether the application of the statute would be valid in other contexts." *Id.* at 585, n.2.

Similarly, in *Pap's,* Justice O'Connor writing for the plurality, addressed what showing must be made by the government to establish that a regulation prohibiting nude dancing was enacted for the purpose of ameliorating adverse secondary effects to pass constitutional muster. 529 U.S. at 300-01. The plurality determined that the City had met its burden of justifying its public indecency ordinance as applied to adult entertainment establishments.

In the course of the analysis, the plurality emphasized, however: "Because the [lower] court determined that the public nudity provisions of the ordinance violated Pap's right to freedom of expression under the United States Constitution, it did not address the constitutionality of the ordinance under the Pennsylvania Constitution or the claim that the ordinance is unconstitutionally overbroad." *Id.* at 286.

This case raises the precise overbreadth issue not

presented and consequently not resolved in *Barnes* and *Pap's*.

Thus, in addition to presenting the Court with the opportunity to resolve a conflict among the circuit courts of appeals, this case provides this Court with the opportunity to decide important and pervasive issues of overbreadth raised by a regulation of expressive nudity, left unresolved in *Barnes* and *Pap's*.

III. THE COURT BELOW ERRED WHEN IT REVERSED THE JUDGMENT OUTRIGHT WITHOUT REMANDING THE CASE TO THE DISTRICT COURT FOR DETERMINATION OF PLAINTIFFS' AS-APPLIED CHALLENGE TO OHIO'S LIQUOR REGULATION LEFT UNRESOLVED BY THAT COURT.

Plaintiffs, in addition to challenging Rule 52's unconstitutional overbreadth, challenged Rule 52 on the ground that it was unconstitutional as applied to them. R. 1, *Verified Complaint*, ¶20, pp. 6-7. They advanced argument on that basis and produced evidence in support of that claim at the hearing on their Motion for a Preliminary Injunction. *See Testimony of Daniel Linz, Ph.D.*, Tr. P. I. at 58-150.

The district court, while characterizing as persuasive Dr. Linz's study rebutting Defendants' claims of adverse secondary effects, found it "need not resolve the as-applied issue at this juncture" because of its finding that Plaintiffs had shown a strong likelihood of success on their claim that Rule 52 was unconstitutionally overbroad.

App. 53; 314 F. Supp. 3d at 757. In issuing the permanent injunction, the district court adopted its earlier opinion and made no ruling on the as-applied challenge. App. 33-34.

The majority issued a judgment of reversal. Given that the district court declined to resolve Plaintiffs' as-applied challenge because of its finding that Rule 52 was unconstitutionally overbroad, an outright reversal was improper. *See, Crawford v. Metropolitan Government of Nashville and Davidson County,* __U.S.__; 129 S. Ct. 846 (2009) (instructing that issues not reached by district court because of ruling on another dispositive ground, remain open on remand.)

Plaintiffs in their Petition for Rehearing and Rehearing *En Banc* requested that the panel modify its judgment and remand this case for further proceedings on the as-applied challenge. The panel denied Plaintiffs' request. App. 72.

CONCLUSION

For these reasons, Petitioners respectfully request that the Court accept this case for review.

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APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 08a0293p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

J.L. SPOONS, INC.,		
Plaintiff-Appellee,		
		No. 07-3178
v.		
	>	
NANCY J. DRAGANI, Acting-Director, Ohio Department of Safety, et al.,		
Defendants-Appellants.		

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 04-00314-Ann Aldrich, District Judge.

Argued: March 18, 2008

Decided and Filed: August 15, 2008

Before: RYAN, SILER, and COLE, Circuit Judges.

COUNSEL

ARGUED: Robert J. Krummen, OFFICE OF THE OHIO

ATTORNEY GENERAL, Columbus, Ohio, for Appellants. J. Michael Murray, BERKMAN, GORDON, MURRAY & DeVAN, Cleveland, Ohio, for Appellee. **ON BRIEF**: Robert J. Krummen, William P. Marshall, Charles E. Febus, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellants. J. Michael Murray, BERKMAN, GORDON, MURRAY & DeVAN, Cleveland, Ohio, for Appellee.

SILER, J., delivered the opinion of the court, in which RYAN, J., joined. COLE, J. (pp. 8-14), delivered a separate dissenting opinion.

OPINION

SILER, Circuit Judge. Plaintiffs, a group of strip club owners in Ohio, challenged Ohio Liquor Control Commission Rule 52 on First Amendment grounds. Enacted in 2004, Rule 52 provided that an establishment holding a liquor permit may not knowingly or willfully allow nudity or sexual activity on its premises. The district court granted plaintiffs a temporary injunction against enforcement of Rule 52. Later, it declared that parts of Rule 52 were unconstitutionally overbroad and it permanently enjoined their enforcement anywhere in Ohio. Defendants now appeal, arguing that Rule 52 is constitutional. We hold that Rule 52 is not overbroad and we REVERSE.

BACKGROUND

The strip club owners challenge §§ (A)(2), (B)(2), and (B)(3) of revised Rule 52. The challenged sections read as follows:

> (A) Definitions as used in this rule:
> (2) "Nudity" means the showing of the human male or female genital, pubic area or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple and/or areola; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum, anal region, or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of the nipples and/or areola.
> (B) Prohibited activities: no permit holder, his agent, or employee shall knowingly or willfully allow in and upon his licensed permit premises any persons to:
> (2) Appear in a state of nudity;
> (3) Engage in sexual activity as said term is defined in ORC Chapter 2907.

Sexual activity means "sexual conduct or sexual contact, or both." ORC Chapter 2907. The Ohio Revised Code defines "sexual conduct" as:

> vaginal intercourse between a male and female, anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

"Sexual contact" is defined as "any touching of an

erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." ORC Chapter 2907.

In July 2000, the district court permanently enjoined enforcement of several sections of old Rule 52[1], finding them invalid under the First and Fourteenth Amendments. As a result, the Ohio Liquor Control commission ("the Commission") commenced proceedings for the enactment of a new version of Rule 52. In September 2003, the Commission received evidence and testimony regarding the validity of proposed new language for Rule 52. At this hearing, Mark Anderson, Executive Director of the Commission, testified that the earlier version of Rule 52 had been rescinded and that all of the filing requirements imposed by state law for the new version of Rule 52 had been met.

The Commission heard extensive testimony from Bruce Taylor, an attorney from Fairfax, Virginia. Throughout his career he prosecuted vice crimes, including obscenity, prostitution, and liquor violations. He spoke at length about his understanding of precedent in this area and the constitutionality of liquor regulations. He testified that "nude dancing does contribute to its own types of secondary effects and to a greater degree than other liquor bars that don't have nude dancing." Specifically, prostitution, drug trafficking, and fights occur more frequently in and around bars that allow nude dancing than those that do not permit nude dancing. Taylor expressed his opinion that the language under

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[1] The primary difference between the old and the new Rule 52 is that the old Rule 52 covered the showing of electronically reproduced images depicting actual or simulated sexual activities.

consideration for the new Rule 52 would be held constitutional by the courts.

The new version of Rule 52 was finalized and filed on February 9, 2004. It was scheduled to take effect on February 20, 2004. On February 20, the strip club owners filed suit after learning of plans for enforcement agents to investigate strip clubs to determine compliance with Rule 52. They claimed that the Rule 52 provisions concerning "nudity" and "sexual activity" were broadly restrictive of protected expression. They sought a declaratory judgment that these sections were unconstitutional and a permanent injunction barring their enforcement. The district court granted the request for a temporary restraining order and scheduled a preliminary injunction hearing.

At the preliminary injunction hearing, the plaintiffs called Dr. Judith Hanna, Ph.D., a cultural anthropologist and sociologist who researches and writes about arts, dance, and society. She stated that exotic and erotic dance has artistic value and conveys a range of potential messages. She also discussed a variety of "mainstream" ballet, modern dance, and theater performances that allegedly involve types of nudity and sexual contact that could be prohibited by Rule 52. The club owners also presented testimony from Dr. Daniel Linz, Ph.D., a sociologist and psychologist, who stated that his research showed no positive correlation between the presence of liquor-serving establishments featuring nude or semi-nude dancing and the types of crimes cited by Commission in support of its decision to adopt Rule 52. Dr. Linz stated that in some cases there was a negative correlation, meaning that nude dancing establishments actually decreased crime in the surrounding community.

The Commission then presented testimony from Scott

Pohlman of the Ohio Department of Safety in support of Rule 52. He described numerous occasions where he personally observed illicit behavior in and around liquor-serving establishments that feature nude or semi-nude dancing. He stated that Rule 52 was needed to limit illicit behavior.

Following the hearing, the Commission agreed to refrain from enforcing Rule 52 until at least April 1, 2004, in order to grant the district court enough time to enter a ruling on the strip club owners' motion for a preliminary injunction. On April 1, the district court granted plaintiffs' motion for a preliminary injunction against the Commission. It enjoined the defendants from enforcing §§ (A)(2), (B)(2), and (B)(3) anywhere in Ohio. In January 2007, it granted plaintiffs a permanent injunction and declared §§ (A)(2), (B)(2), and (B)(3) unconstitutionally overbroad. The district court concluded that it could not sever the unconstitutional language from the regulation because §§ (A)(2), (B)(2), and (B)(3) were overbroad.

ANALYSIS

We review constitutional issues de novo. *Vasha v. Gonzales*, 410 F.3d 863, 872 (6th Cir. 2005). We find that Rule 52 is a constitutional, content-neutral regulation of the undesirable secondary effects, including prostitution, drug trafficking, and assault, associated with nude dancing in an environment serving alcohol. It is not overbroad.

Pap's A.M.

Rule 52 is almost identical to the regulation upheld by the Supreme Court in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). While *Pap's A.M.* involved a challenge on First Amendment freedom of expression grounds, not an

overbreadth challenge, a discussion of *Pap's A.M.* is necessary. In *Pap's A.M.*, the United States Supreme Court upheld a regulation making it "a summary offense to knowingly or intentionally appear in public in a 'state of nudity.'" *Id.* at 283. The regulation had wording and definitions very similar to Rule 52.

The Court began its analysis by stating that while being "in a state of nudity" is not an inherently expressive condition, nude dancing is expressive conduct and it falls within "the outer ambit" of the First Amendment's protection. *Id.* at 289. To determine what level of scrutiny applies, a court must decide whether the state regulation is related to the suppression of expression. *Id.* If the governmental purpose is unrelated to suppression of expression, then the regulation must satisfy the less stringent standard from *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *Id.* If, on the other hand, the government interest is related to the content of the expression, the regulation must be justified under a more demanding standard. *Id.*

The Court held that government restrictions on public nudity, such as the one passed by Erie, "should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech." *Id.* If a law is a general prohibition on public nudity, then by its terms it regulates conduct alone, not speech. *Id.* at 289-90. The ordinance at issue did not attempt to regulate the primary effects of expression, i.e., the effect of the audience watching nude dancing, but rather the secondary effects that impact the public health, safety and welfare. *Id.*

The regulation must pass muster under the *O'Brien* standard: (1) the regulation must be within the

constitutional power of the government to enact, (2) the regulation must further an important or substantial government interest, (3) the government interest must be unrelated to the suppression of free expression, and (4) the restriction must be no greater than essential to the furtherance of the government interest. *Id.* at 296, 301. The Erie regulation passed the *O'Brien* test. First, Erie's efforts to protect public health and safety were clearly within the police powers. *Id.* at 296. Second, the regulation furthered a substantial government interest because Erie found that "lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety, and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity." *Id.* at 297 (quoting Erie's findings contained in Petition for Cert.). Erie did not need to carry out a study documenting these effects and it did not need to develop a specific evidentiary record to supports its ordinance. *Id.* at 298. It is self-evident that strip clubs cause public health and safety problems. *Id.* at 300-01. Third, the government's interest in suppressing the negative secondary effects of strip clubs was unrelated to the suppression of free expression. *Id.* at 301. Finally, the restriction was no greater than was essential because it only had a de minimis impact on the expressive element of nude dancing. *Id.* The requirement that dancers wear pasties and G-strings is a minimal restriction that leaves ample capacity to convey the dancer's erotic message. *Id.*

Overbreadth

Pap's A.M. would be directly on-point and would decide the issue were it not for the fact that the district court struck down Rule 52 on the grounds that it was overbroad, not that it violated the First Amendment

guarantee of freedom of expression under *O'Brien*. *Pap's A.M.* did not address an overbreadth argument. *See* 529 U.S. at 286 (stating that lower court did not reach the overbreadth issue). The overbreadth doctrine prohibits the government from proscribing a "substantial" amount of constitutionally protected speech judged in relation to the statute's plainly legitimate sweep. *Virginia v. Hicks*, 539 U.S. 113, 118-119 (2003). A finding that a law is overbroad "suffices to invalidate all enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Id.* at 119 (internal quotations omitted). Overbreadth doctrine exists to allay the concern that the threat of enforcement of an overbroad law may deter or chill constitutionally protected speech- especially when the law provides criminal sanctions. *Id.* Many persons would refrain from engaging in constitutionally-protected speech rather than risk case-by-case litigation of their rights, putting them at substantial risk. *Id.* Thus the overbreadth doctrine exists to protect the marketplace of ideas and reduce the social costs of withheld speech. *Id.*

However, "there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting enforcement of that law." *Id.* This principle is especially important when a law reflects the legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. *Id.* Overbreadth doctrine creates substantial social costs when it blocks application of a law to constitutionally unprotected conduct. *Id.* "To ensure that these costs do not swallow the social benefits of declaring a law overbroad, [the Supreme Court has] insisted that a law's application to protected speech be substantial . . . relative to the scope of the law's plainly

legitimate applications . . . before applying the strong medicine of overbreadth invalidation." *Id.* at 119-20 (internal quotations omitted). The overbreadth claimant bears the burden of demonstrating from the text of the law and from actual fact that substantial overbreadth exists. *Id.* at 122. We have emphasized that overbreadth doctrine is only to be used as a last resort. *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 300 (6th Cir. 2008).

The strip club owners cannot carry their burden to show that Rule 52 is substantially overbroad. Nude dancing is protected by the First Amendment, but it is within the "outer ambit" of the First Amendment's protection. *Pap 's A.M.*, 529 U.S. at 289. Rule 52 has a minimal impact on the marketplace of ideas because persons desiring to perform mainstream works of art involving nudity and sexual activity may do so in an establishment that is not licensed to sell liquor. In the alternative, they may perform their works in an establishment licensed to sell liquor if they wear clothing or pasties and a G-string and avoid sexual conduct or sexual contact. Ohio narrowly defines sexual conduct to include vaginal intercourse, oral sex, and vaginal or anal penetration. The prohibition against sexual contact applies only if the purpose of the contact is to arouse sexually or to gratify either person. By its own terms, Rule 52 does not apply to contact done in furtherance of legitimate works of art for the purpose of conveying artistic meaning, such as the touching of an actor's thigh in a play. Thus, mainstream works of art that merely suggest sexual activity will not be burdened. Invalidating Rule 52 as overbroad would impose substantial societal costs because it would hamper Ohio's legitimate interest in curtailing the negative secondary effects, such as prostitution and drug trafficking, associated with an environment mixing alcohol with nudity and sexual

activity. *See Hicks*, 539 U.S. at 119.

The district court concluded that "numerous examples of mainstream theater and dance which contain nudity and/or sexual contact," such as Oh! Calcutta!, would be prohibited by Rule 52. However, such productions may still be held in venues that do not have a liquor license, or by requiring the performers to wear pasties and a G-string and to avoid vaginal intercourse, oral sex, and vaginal or anal penetration. *See Pap's A.M.*, 529 U.S. at 301 ("The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message"). While there may be legitimate artistic works that involve actors appearing in a state of nudity, "[b]eing in a state of nudity is not an inherently expressive condition" that is protected by the First Amendment. *Id.* at 289. Moreover, the First Amendment does not provide a right to engage in sexual activity in public. The effect of Rule 52 on legitimate artistic works is incidental and does not call for the "strong medicine" of overbreadth doctrine.

Furthermore, a law is not invalid simply because some impermissible applications are conceivable. *New York v. Ferber*, 458 U.S. 747, 772 (1982) (concluding that a New York statute prohibiting possession of child pornography was not overbroad); *see also Sensations, Inc.*, 526 F.3d at 300 (upholding regulation banning total nudity in sexually oriented businesses because there was no realistic danger that the statute would significantly compromise recognized First Amendment protections of parties not before the court). In *Ferber*, the Supreme Court upheld against an overbreadth challenge a statute criminalizing possession of child pornography even though it may have reached some protected expression, such as medical

textbooks and artistic works. 458 U.S. at 773. The Court upheld the statute because it "seriously doubt[ed] . . . that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach." *Id.* Here, analogizing to *Ferber*, any arguably impermissible application of the statute to citizens engaged in artistic expression amounts to no more than a fraction of Rule 52's reach. Also, as in *Sensations*, there is no "realistic danger" that the regulation will "significantly compromise recognized First Amendment protections of parties not before the [c]ourt" because there is no constitutional right to appear in public in a state of nudity or engage in sexual intercourse in public. 526 F.3d at 300.

The district court relied heavily on *Triplett Grille, Inc v. City of Akron*, 40 F.3d 129 (6th Cir. 1994), in striking down Rule 52 as overbroad. In *Triplett Grille*, we struck down as overbroad an Akron ordinance banning public nudity. The city's lawmakers testified that they enacted the provision because of constituents' moral outrage toward nude dancing. *Id.* at 131. No witness testified that the prevention of prostitution or other illegal activity was the ordinance's goal. *Id.* Instead, lawmakers passed the ordinance to establish "a community standard" even though Akron had never experienced any negative secondary effects commonly associated with nudity. *Id.* We struck down the ordinance as overbroad:

> Because the City has failed to demonstrate a link between nudity in *non-adult entertainment* and secondary effects, we do agree with the district court that the Akron ordinance must be struck down as facially unconstitutional under the First Amendment overbreadth doctrine.

Id. at 135 (emphasis added). The public indecency ordinance prohibited all public nudity, including live performances with serious literary, artistic, or political value. *Id.* at 136. Because the ordinance covered expressive conduct with literary and artistic value that is not generally associated with prostitution, sexual assault, or other crimes, it was overbroad. *Id.*

Triplett Grille is distinguishable from the situation presented here and does not control. First, in *Triplett Grille*, the city ordinance banned *all* public nudity in *all* public places. 40 F.3d at 131. However, Rule 52 bans public nudity only in establishments licensed to sell liquor. Therefore, Rule 52 is much less restrictive and covers much less speech than did the regulation at issue in *Triplett Grille*. Second, in *Triplett Grille*, the city enacted its ban because of constituents' moral outrage toward nude dancing, not concern over the negative secondary effects of nude dancing. *Id.* Here, however, the Commission enacted Rule 52 out of a concern over the negative secondary effects of nude dancing, not moral outrage. Moreover, the *Pap's A.M.* Court rejected Justice Souter's concurrence in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 581 (1991) (Souter, J., concurring), upon which the *Triplett Grille Court* exclusively relied, 40 F.3d at 136, and held that the proponent of a regulation did not need to carry out *any* study documenting secondary effects and it did not need to develop a specific evidentiary record to support its ordinance.[2] *Pap's A.M.*, 529 U.S. at 299-300

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[2] While *Barnes* involved a First Amendment freedom of expression challenge to regulation, not an overbreadth challenge, 501 U.S. at 585 n. 2, we nevertheless incorporated the reasoning of *Barnes* into our overbreadth analysis in *Triplett Grille*, 40 F.3d at 136. Applying the rule from *Marks v. United States*, 430 U.S. 188 (1977), that the opinion of the Justice concurring in the judgment on the narrowest

(rejecting Justice Souter's position that Erie should have conducted a study because negative secondary effects are amenable to empirical treatment). *Triplett Grille's* progeny are similarly distinguishable. *See, e.g., Hamilton's Bogarts v. Michigan*, 501 F.3d 644 (6th Cir. 2007); *Odle v. Decatur County*, 421 F.3d 386 (6th Cir. 2005). Rule 52 is constitutional and the Commission was not required to study the application of the ordinance to non-adult or "high- culture" theater.

REVERSED.

DISSENT

COLE, Circuit Judge, dissenting. The Ohio Liquor Control Commission ("Commission") enacted Ohio Administrative Code § 4301:1-1-52 ("Rule 52") in order to fight the negative secondary effects resulting from the combination of liquor and nudity or sexual activity at nude- dancing establishments. But instead of limiting the reach of Rule 52 to those establishments, the Commission

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grounds should be considered the Court's opinion, the *Triplett Grille* court relied on Justice Souter's concurring opinion in *Barnes* for its holding. 40 F.3d at 133-36. Like *Barnes*, *Pap's A.M.* resulted in a plurality opinion on the merits of the case, although a majority of the Justices concluded that the case was not moot. 529 U.S. at 282-83. Applying the *Marks* doctrine, we conclude that Justice O'Connor's opinion is the Court's opinion because it was the narrowest opinion concurring in the judgment. Justice Scalia's concurring opinion, in which Justice Thomas joined, concluded that the case was moot and is therefore not the narrowest opinion concurring in the judgment. *Id.* at 302 (Scalia, J., concurring). Thus, *Pap's A.M.* modified *Barnes*, which underpinned our reasoning in *Triplett Grille*.

chose to "burn the house to roast the pig," *Butler v. Michigan*, 352 U.S. 380, 383 (1957), by applying Rule 52 to all 25,000 liquor permit holders in the state of Ohio, and by failing to exempt persons engaging in performances with literary, artistic, or political value. Because I believe that Rule 52 is not reasonably restricted to its intended purpose and thus unconstitutionally overbroad, I respectfully dissent.

First things first. My colleagues and I agree on at least one significant matter – *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), has no bearing on this case. In *Pap's A.M.*, the Supreme Court considered an ordinance enacted by the City of Erie, Pennsylvania, making it an offense to knowingly or intentionally appear in public in a "state of nudity." While a plurality of the Court ultimately reversed the Pennsylvania Supreme Court's decision to enjoin the statute, concluding that the ordinance satisfied the four-part test established in *United States v. O'Brien*, 391 U.S. 367 (1968), the Court did not reach the question of the law's overbreadth. *See Pap's A.M.*, 529 U.S. at 286. As the majority recognizes, this distinction is significant because there is little question, nor do the plaintiffs even dispute, that Rule 52 *as applied* to nude-dancing establishments would be constitutional. *See Id.* at 296-302. But the question on appeal – indeed, the *only* question before us – is whether Rule 52, as written, unnecessarily infringes upon First Amendment freedoms outside of the permissible regulation of nude-dancing establishments.

The answer to this question is where we respectfully part ways. I acknowledge that the overbreadth doctrine should be considered "strong medicine" to be used "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). But when a law criminalizes a "substantial" amount of protected speech,

"judged in relation to the statute's plainly legitimate sweep," *id.* at 615, we must enjoin the enforcement of the law, "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression," *id.* at 613. This longstanding rule is rooted in the "assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* at 612. *See also Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 274 F.3d 377, 387 (6th Cir. 2001). With that in mind, I see three main problems with Rule 52.

1. Rule 52 applies to substantially more venues than necessary. By issuing Rule 52, the Commission intended to address the "undesirable secondary effects throughout the state of Ohio of sexually oriented or adult businesses where alcohol was served" – namely, the increased presence of drugs, prostitution, underage drinking, and inappropriate physical contact between dancers and patrons, including assault. (Joint Appendix ("JA") 302-03.) But instead of being limited to those establishments, Rule 52 applies to all 25,000 privately owned and operated manufacturers, distributors, and retailers of alcoholic beverages in the state of Ohio. *See* Dep't of Liquor Control 2007 Annual Report, at 11, *available at* http://www.com.ohio.gov/liqr/docs/liqr_2007AnnualReport.pdf.

Of those 25,000 permit holders, about half are carry-out retail stores, and about half are establishments that could potentially present live entertainment. Of those approximately 12,500 venues that could potentially present live entertainment, only 200 or so are venues which currently feature nude or semi-nude dancing. (JA 265, 283.) That means that about 12,300 – or 98.4 percent – of

alcohol permit holders in Ohio that potentially present live entertainment are needlessly required to conform to Rule 52's mandates.

To illustrate the staggering breadth of Rule 52's application, here is a sampling of the venues affected: bars, restaurants, nightclubs, hotels, county clubs, convention centers, theaters, stadiums, comedy clubs, concert halls, playhouses, ballet houses, and museums. In fact, the following venues in Cleveland *alone* are subject to the Rule: the Amphitheater at Tower City, the Cleveland Museum of Arts, the Cleveland Agora Theater and Ballroom, the Great Lakes Science Center, the Beachland Ballroom, the Cleveland Play House Club, Jacobs Field, Gund Arena, the Cleveland Convention Center, the Nautica Pavilion, the State Theater, the Playhouse Square Foundation, the Allen Theatre at Playhouse Square, and Severance Hall. None of those venues have been identified by the Commission as places where illegal narcotics are taken or distributed, and none are places where prostitution is a recurring problem. But they are, however, places where constitutionally protected speech might be prevented. This brings me to my second concern.

2. **Rule 52 affects a substantial number of artistic performances protected by the First Amendment.** Rule 52 prohibits any "permit holder, his agent, or employee [from] knowingly or willfully allow[ing] in and upon his licensed permit premises any persons to: . . . (2) Appear in a state of nudity; (3) Engage in sexual activity as said term is defined in Chapter 2907 of the Revised Code." Ohio Admin. Code § 4301:1-1-52(B). "Sexual activity," in turn, is defined as "sexual conduct or sexual contact, or both." Ohio Rev. Code § 2907.01(C).

There are two provisions that I find particularly

troubling. First, "nudity" includes not only the showing of male or female genitalia, pubic area or buttocks, or the female breast "with less than a fully opaque covering," but also "the exposure of any device, costume, or covering which gives the *appearance of or simulates*" those body parts. Ohio Admin. Code § 4301:1-1-52(A)(2) (emphasis added). So Rule 52 criminalizes any performance, whether a play, ballet, or musical, which contains a fleeting scene involving the exposure of a female breast, even if a performer wears a nudity-simulating device or costume giving the appearance of a female breast.

Second, "sexual contact" is defined as "any touching of an erogenous zone of another, including *without limitation* the thigh, genitals, buttock, pubic region, or, if the person is female, a breast, for the purpose of sexually arousing or gratifying either person." Ohio Rev. Code § 2907.01(B) (emphasis added). This carries a risk of enforcement against a variety of ballet and dance performances, in which choreographers frequently require participants to "touch" the "erogenous zones" of one another for the purpose of conveying a sexual message.

Together, these two provisions prohibit on licensed premises any live entertainment that contains even a brief scene involving simulated nudity or the touching of any erogenous zone, even if the nudity or touching is integral to the narrative of the performance, and even if alcoholic beverages are not being served during the actual performance. To name but just a few examples: the buttocks of the dancing murderesses in *Chicago*, the jarring depiction of incest in the dance *Big Bertha*, the rebellious nudity of the performers in *Hair* depicting the counter-culture of the 1960s, the nudity of a woman staging a poetic battle as she dies of ovarian cancer in the Pulitzer Prize-winning drama *Wit*, the dramatic portrayal

of sexual assault in A *Streetcar Named Desire*, and the nudity of a young man suffering from a psychological condition in *Equus*, recently popularized by Daniel Radcliffe (more commonly known for his role as Harry Potter). Whatever one might think of these performances -- and we could disagree for years as to whether they should be considered mainstream, independent, subversive, or some combination of the three – it simply does not matter: in the eyes of the First Amendment, they are no less valuable than the famous works by Shakespeare or Arthur Miller.

In short, Rule 52 does not apply only to nude dancing, which "falls only within the outer ambit of the First Amendment's protection," *Pap's A.M.*, 529 U.S. at 289, but also to a variety of "live entertainment, such as musical and dramatic works," *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981), that are entitled to the full protection of the First Amendment. *See also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 603 ("Put differently, art is entitled to full protection because our 'cultural life,' just like our native politics, 'rest[s] upon [the] ideal' of governmental viewpoint neutrality.") (citation omitted, alterations in original). This is true even if those performances contain nudity or other sexual elements that some citizens might find offensive, *see Reno v. ACLU*, 521 U.S. 844, 874 (1997), which brings me to my final concern.

3. Rule 52 does not offer any limiting construction. As part of our analysis, we must "consider any limiting construction that a state court or enforcement agency has proffered," *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982), that can save an otherwise unconstitutional statute by eliminating the statute's substantial overbreadth, *Virginia v. Hicks*, 539

U.S. 113, 119 (2003). If a statute is "readily susceptible" to a limiting interpretation that would make it constitutional, the statute must be upheld, but "we will not rewrite a state law to conform it to constitutional requirements." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988).

The Commission concedes that Rule 52 is not readily susceptible of any construction that would exempt persons engaging in performances that have literary, artistic, or political value, because it has no discretion in "pick[ing] and choos[ing] which permit holders" are subject to Rule 52's requirements, and is duty-bound "to enforce it evenly and equally against all permit holders in the state of Ohio." (JA 254.) In fact, the only reason advanced by the Commission for not excluding "legitimate high culture theater," is because it would be impossible to "have a rule that would make sense if you went through and tried to have exceptions for all sorts of things." (JA 290-91.)

The majority attempts to sidestep this issue by noting that "such productions may still be held . . . by requiring the performers to wear pasties and a G-string." Maj. Op. 5. But *Pap's A.M.*, upon which my colleagues rely for this proposition, held only that the nude dancers at *nude-dancing establishments* may be required to wear these devices because they are "a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message." 529 U.S. at 301. No court, to my knowledge, has ever held that a state may require "pasties" or "G-strings" for performances with serious artistic or literary value, particularly when the state fails to assert a single interest for such a requirement.

More to the point, Rule 52 prohibits not only actual

nudity, but also "the exposure of any device, costume, or covering which gives the appearance of or simulates" nudity, Ohio Admin. Code § 4301: 1-1-52(A)(2), which would almost certainly include both the use of "pasties" or a "G-string." The result, according to the testimony of John Duvall, the then-Deputy Director of the Ohio Department of Public Safety, is that a venue reading the plain language of Rule 52 "would []discover that the language of the rule forbids it from presenting an artistic performance that has a fleeting scene involving the exposure of a woman's areola and nipple." (JA 354.) If those venues "wanted to be safe," Duvall opined, "they would refrain from presenting that particular performance [at all]." (*Id.*)

The same can be said of the provision prohibiting "sexual contact." While "sexual contact" is limited to "touching . . . for the purpose of sexually arousing or gratifying either person," Ohio Rev. Code § 2907.01(B), there are a large number of contexts in which performers undertaking constitutionally protected forms of expression might seek to convey a message with a sexual component.[1] At the very least, there is a high probability Rule 52 would be interpreted as prohibiting the kinds of touching that commonly occurs in ballets, plays, or musicals. When Duvall was asked whether those venues "would know they better not present the performance that would be so interpreted or else they risk the possibility that they could be punished," he admitted that they should not. (JA 355.)

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[1]It is also troubling that the prohibition on "sexual contact" applies to patrons as well as employees. Under Rule 52, a bar owner who witnesses a customer flirtatiously touching another customer, on any potentially "erogenous" part of the body, including "the thigh," must take affirmative steps to end this conduct, or risk a citation from the Commission.

True, as the majority points out, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). But this does not mean the speech must be presently ongoing. Because the overbreadth doctrine is designed "to prevent the *chilling* of *future* protected expression," *Staley v. Jones*, 239 F.3d 769, 779 (6th Cir. 2001) (emphasis added), whether such performances have been put on in the past, or whether there are plans to do so in the future, is irrelevant. *See Odle v. Decatur County*, 421 F.3d 386, 397 (6th Cir. 2005) ("[N]either proof that an ordinance as currently applied has no unconstitutional effect, nor assurances offered by the relevant local authorities that the ordinance will not be put to such an effect in the future, constitute 'constructions' of the ordinance, as that term is ordinarily understood."). In any event, the Commission can hardly say that the application of Rule 52 to serious theatrical performances is merely hypothetical, since it actually issued a citation against the production of *Oh! Calcutta!* in the past. (JA 246, 290.)

Perhaps most importantly, even if one believes that the impact on these performances will be minimal, or that the state's interest in preventing prostitution or distribution of illegal narcotics is especially worthwhile, it is worth reemphasizing that Rule 52 burdens these performances without any justification. Much of the Commission's argument focuses on the relative insignificance of the affected speech. I admit that *Hair* may not be "substantial" judged in relation to the entire spectrum of protected activities under the First Amendment. But the overbreadth doctrine, limited as it may be, requires us to judge Rule 52 "in relation to [its] plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. With

respect to nude or topless dancing at clubs or bars, an interest in limiting the harmful secondary effects may justify the challenged provisions. With respect to ordinary theater and ballet performances, concerts, and other artistic forms of entertainment, however, the Commission provides "no evidence, no judicial opinion, and not even any argument [] to suggest that these mainstream entertainments, to which it has conceded the restrictions apply, produce the kind of adverse secondary effects that the state seeks to prevent." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 516 (4th Cir. 2002). Because Rule 52's "plainly legitimate sweep" is extraordinarily narrow compared to the breadth of the rule, it criminalizes substantially more speech than constitutionally permissible.

The foregoing observations are, in my view, sufficient to resolve the issue before us. But I will add one more: *Odle*, 421 F.3d 386, controls the outcome of this case. In *Odle*, we invalidated a county "ordinance prohibit[ing], among other things, nudity and the performance of a wide range of arguably sexually suggestive acts in 'public place[s] where intoxicating liquors [] are offered for sale, served or consumed," *id.* at 392 (citation omitted, alteration in original), as unconstitutionally overbroad, because it "'ma[de] no attempt to regulate only those expressive activities associated with [the targeted] harmful secondary effects,'" *id.* at 399 (quoting *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 136 (6th Cir. 1994)).

Like Rule 52, the ordinance in *Odle* did not apply to every public venue, but instead only to venues that sold or served alcohol. *Id.* at 388. Like Rule 52, the ordinance prohibited entertainment in which a performer "expose[s] . . . that area of the human breast at or below the top of the

areola, . . . his or her genitals, pubic area, buttocks, anus or anal cleft or cleavage," or"give[s] the appearance of or simulate[s]" those parts of the body. *Id.* at 394. And like Rule 52, the ordinance prohibited "performance of acts or simulated acts" of certain physical contact in dramatic scenes or dances that communicated messages of eroticism or sexuality. *Id.*

Acknowledging that other courts have upheld statutes and ordinances banning nudity or sexually suggestive conduct in a wide range of public places, we found "crucial" the fact that the state liquor commission had produced no evidence that liquor-licensed establishments in general, as opposed to those particular establishments that regularly present nude or semi-nude dancing, caused the harmful effects of combining alcohol and nudity. *Id.* at 395-96. And because the ordinance in *Odle* contained no exemptions for artistic or theatrical performance, "it reache[d] a wide swath of public places," *id.* at 395, and would therefore prohibit a "myriad [of] performances that involve nudity or sexually suggestive content but to which the alleged harmful secondary effects that purportedly motivated the passage of the ordinance do not attend," *id* at 393. *See also Triplett Grille,* 40 F.3d at 136 (striking down a public indecency ordinance as overbroad because the law prohibited "all public nudity, including live performances with serious literary, artistic, or political value," which swept "within its ambit expressive conduct not generally associated with prostitution, sexual assault, or other crimes").

My colleagues' attempt to distinguish *Odle* falls short. To the best I can tell, *Odle* is arguably different only in that (1) the ordinance applied to all public places and (2) the county enacted the ordinance because of a moral opposition to nude dancing.

As to the first, the ordinance in *Odle* applied to all public places where intoxicating liquors were offered for sale, served, or consumed, whereas Rule 52 applies to all alcohol permit holders, their agents, or employees. Although the ordinance in *Odle* defined "public places" broadly, 421 F.3d at 392 n.7, the alcohol limitation would seem to render the ordinance's reach to exactly the same places as Rule 52–namely, to venues with an alcohol permit. But even if it is true that the ordinance in *Odle* applies to certain places where Rule 52 does not, the *Odle* court primarily focused on the chilling of expressive performances involving nudity or sexually suggestive acts in mainstream theaters, the very same performances that I am concerned about today. *Id.* at 395-96.[2]

I find the latter distinction even less persuasive, because the question before us is not whether Rule 52 is constitutional as applied to nude-dancing establishments. So for whatever reason the county in *Odle* enacted the ordinance–whether it be on moral grounds or to reduce prostitution-we can assume that the county had a legitimate justification. That, of course, is irrelevant to the question of whether the ordinance sweeps within its reach a broad swath of expressive conduct not associated with

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[2] *Odle* "[left] for another day the question whether strict scrutiny ought to apply to an ordinance that prohibits not only nudity but also sexually suggestive acts performed while clothed," and concluded that "intermediate scrutiny requires (at least) proof that most establishments to which the challenged ordinance or statute applies are likely to spawn harmful secondary effects if permitted to hold performances involving nudity and/or content that could reasonably be viewed as sexually suggestive." 421 F.3d at 394. Because I believe that Rule 52 similarly "'reaches a substantial number of impermissible applications' relative to [its] legitimate sweep," *Deja Vue*, 274 F.3d at 387 (quoting *New York v. Ferber*, 458 U.S. 747, 771 (1982)), I also see no need to address this question.

the county's identified undesirable secondary effects.[3]

Our recent decision in *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291 (6th Cir. 2008), does not change this analysis. *Sensations* involved the constitutionality of a municipal ordinance "banning total nudity in sexually oriented businesses," which, unlike Rule 52 and the ordinance in *Odle*, involved a "far narrower [regulation] than . . . [one] applicable to the general public." *Id.* at 300. In fact, *Sensations* demonstrates what I have been saying all along: that had the Commission applied Rule 52 solely to nude-dancing establishments, the only establishments where the undesirable secondary effects from combining nudity and alcohol have been identified, this would be a significantly different case.

The vast majority of our sister circuits, moreover, share this view. *See Conchatta, Inc. v. Miller*, 458 F.3d 258, 266 (3d Cir. 2006) (invalidating as overbroad a liquor regulation that prohibited "any lewd, immoral or improper entertainment," because the regulation has a "chilling effect on a wide range of. . . artistic, theatrical, and other

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[3]I am uncertain how Justice Souter's concurring opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 581 (1991), which involved an as-applied, not a facial overbreadth, challenge, is relevant to this analysis. Maj Op. at 6. Even if a proponent of a regulation does not need to develop a specific evidentiary record to support its ordinance, this conclusion does not remove the requirement that a statue must not criminalize a "substantial" amount of protected speech in comparison to the "statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. The Commission may not need to develop an evidentiary record to show that the combination of alcohol and nude-dancing establishments produce undesirable secondary effects, but it must not criminalize protected speech (in this case, a performance with serious artisitic or literary value) that has absolutely no relationship to the identified harms.

non-adult entertainment venues"): *Carandola*, 303 F.3d 507 (4th Cir. 2002) (finding a liquor regulation prohibiting any entertainment that "simulates sexual intercourse or any other sexual act" as overbroad, because "the Commission has offered nothing . . . to suggest that these mainstream entertainments . . . produce the kind of adverse secondary effects that the state seeks to prevent"); *Ways v. City of Lincoln*, 274 F.3d 514, 519 (8th Cir. 2001) (striking down a liquor regulation that prohibited "sexual contact," because the ordinance "did not contain any exception for artistic venues").

When our sister circuits have upheld such statutes against overbreadth challenges, those statutes have specifically exempted those performances I speak of. *See Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074, 1083-84 (4th Cir. 2006) (finding a similar statute not overbroad because it exempted "theaters, concert halls, art centers, museums, or similar establishments"); *Farkas v. Miller*, 151 F.3d 900, 905 (8th Cir. 1998) (upholding an application of a public nudity statute because the statute included an exception for "a theater, concert hall, art center, museum, or similar establishment. . .primarily devoted to the arts or theatrical performances"); *J&B Entm't v. City of Jackson, Mississippi*, 152 F.3d 362, 366-67 (5th Cir. 1998) (exempting persons "engaged in expressing a matter of serious literary, artistic, scientific or political value")[4]. By holding otherwise, the majority has set itself apart from nearly

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[4] The trio of cases upon which the Commission relies – *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir. 1998); *Ben's Bar, Inc. v. Vill. of Somerset*, 316 F.3d 702 (7th Cir. 2003); and *BZAPS, Inc. v. City of Mankato*, 268 F.3d 603 (8th Cir. 2001)–miss the boat. All three address the question of whether a similar regulation would be constitutional as applied to nude-dancing establishments, but none involve an overbreadth challenge.

every other court to consider an overbreadth challenge to a similar statute or regulation.

The Commission reminds us time and time again that the state has a strong interest in regulating the negative secondary effects associated with nudity and sexual activity in nude-dancing establishments. I don't have any problem with that. But the state's interest in regulating those effects does not explain its interest in stopping a playhouse with an alcohol permit from presenting a ballet with a brief scene simulating nudity. Maybe there is some negative effect that I am unaware of, or maybe the Commission has some special insight in this area. Whatever the reason, no one–not the district court, not the majority, and certainly not the Commission–has brought such an interest to our attention.

When the government restricts constitutionally protected speech for some legitimate purpose unrelated to the content of the speech in question, we pause for concern. *See Pap's A.M.*, 529 U.S. at 289 ("If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the 'less stringent' standard from *O'Brien* for evaluating restrictions on symbolic speech."). When the government restricts constitutionally protected speech for some legitimate purpose relating to the content of the speech, we give it our full attention. *See id.* ("If the government interest is related to the content of the expression, however, then the regulation falls outside the scope of the *O'Brien* test and must be justified under a more demanding standard."). But when the government restricts constitutionally protected speech without any justification whatsoever, loud alarm bells should sound off in our heads. Because I see Rule 52 as a regulation that fits squarely into this last category, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

J.L. SPOONS, INC., et al.	)
	)Case Nos. 1:98-CV-02857
Plaintiffs,	) 1:04-CV-00314
	)
v.	) Judge Ann Aldrich
	)
KENNETH MORCKEL, et al	)
	) MEMORANDUM AND
Defendants.	) ORDERS
	)

Plaintiffs, a group of club owners, seek to bar the enforcement of Ohio Administrative Code § 4301:1-1-52 ("Rule 52"), as both a violation of their First Amendment rights to free expression, and as unconstitutionally vague and overbroad. Defendants include the Ohio Liquor Control Commission, the Ohio Department of Public Safety, and four individuals named in their official capacities as officers of those state agencies (collectively, "the State"). On April 1, 2004, this Court issued a preliminary injunction against the enforcement of the challenged sections of Rule 52, finding that the club owners had demonstrated a substantial likelihood of success on their overbreadth claims [Docket No. 26].

On June 28, 2004, the court held a hearing on the issue of permanent injunctive relief. At that proceeding, the State presented the testimony of one additional witness and argued that it would not be proper to extend the injunction now in force. On July 14, 2004, the court denied the State's motion for additional hearing time on the issue. After consideration of the State's additional evidence and

authorities cited by the parties, the court grants the club owners request for a permanent injunction, declares §§(A)(2),(B)(2) and (B)(3) of Rule 52 unconstitutionally overbroad, and permanently enjoins their enforcement.

I. Background

This action represents the latest challenge to a series of efforts by the State and its agents to craft regulations limiting the display of nudity and sexual behavior in liquor-serving establishments. This court has previously invalidated portions of Rule 52 as unconstitutional. *See J.L. Spoons, Inc. v. City of Brunswick*, 181 F.R.D. 354 (N.D. Ohio 1998) (*"Spoons I"*); *J.L. Spoons, Inc. v. O'Connor*, 190 F.R.D. 433 (N.D. Ohio 1999) (granting preliminary injunction) (*"Spoons II"*) and *J.L. Spoons, Inc. v. O'Connor*, 194 F.R.D. 589 (N.D. Ohio 2000) (converting preliminary injunction into permanent injunction) (*"Spoons III"*). The club owners bring this action to challenge the constitutionality of a newly-enacted version of Rule 52.

The club owners challenge sections (A)(2), (B)(2), and (B)(3) of new Rule 52, which read as follows:

> (A) Definitions as used i[n] this rule:
>
> > (2) "Nudity" means the showing of the human male or female genital, pubic area or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple and/or areola; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum

> anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of the nipples and/or areola.
>
> (B) Prohibited activities: no permit holder, his agent, or employee shall knowingly or willfully allow in and upon his licensed permit premises any person to:
>
> (2) Appear in a state of nudity;
>
> (3) Engage in sexual activity as said term is defined in Chapter 2907 of the Revised Code;

OHIO ADMIN. CODE § 4301:1-1-52 (2004).

Ohio law defines "sexual activity" as "sexual conduct or sexual contact, or both." OHIO REV. CODE § 2907.01(C) (2006). "Sexual conduct" is defined as:

> . . . vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between person regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

Id. § 2907(A). "Sexual contact" is defined as "any touching of an erogenous zone of another, including without

limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." *Id.* §2907(B).

As in the previous action, the club owners contend that these provisions are unconstitutional under the First and Fourteenth Amendments to the United States Constitution, both as applied to the plaintiffs' establishments, and facially as impermissibly overbroad. As in the previous action, the club owners seek an injunction against the enforcement of the challenged provision.

II. Discussion

In determining whether to issue a permanent injunction, the court must consider (1) whether the movant is actually successful on the merits, (2) whether the movant would suffer continuing irreparable injury for which there is no adequate remedy at law if the court fails to issue the injunction, (3) whether the injunction would cause substantial harm to others, and (4) whether the public interest would be served by issuance of the injunction. *United States v. Szoka*, 260 F.3d 516, 523 (6th Cir. 2001) (citing *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998); *Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross & Blue Shield Ass'n*, 110 F.3d 318, 322 (6th Cir. 1997)).

On the question of success on the merits, the court adopts its previous discussion of the overbreadth of §§ (A)(2), (B)(2) and (B)(3) of Rule 52 under the rubric of *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994), in its order granting the preliminary injunction, noting that the provisions challenged in the instant action are in many ways broader than the provisions rejected by

the court as constitutionally overbroad in the previous action, and finding that the currently challenged sections are constitutionally overbroad. The State has pointed to no authority that modifies the overbreadth approach taken in *Triplett Grille*, while a recent Sixth Circuit case cited by both parties support the court's previous overbreadth analysis in its preliminary injunction order. *Odle v. Decatur County, Tenn.*, 421 F.3d 386, 392-99 (6th Cir. 2005).

Because of the club owners success on the constitutional merits of their claim, the court also finds that failure to issue the permanent injunction would cause continuing irreparable harm. As the court has previously found, the denial of constitutional rights has been held by numerous federal courts, including the Supreme Court, to constitute irreparable harm. Specifically, "[t]he loss of the First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). It follows, as a matter of law, that the club owners will suffer continuing irreparable harm if the State and its agents are not enjoined from enforcing the challenged sections of Rule 52, and that the club owners possess no adequate remedy at law for this irreparable harm. The court also finds that the State will not suffer any appreciable amount of harm if it is enjoined from enforcing the pertinent sections of Rule 52. Therefore, the third factor considered regarding the issuance of a permanent injunction favors the plaintiffs. It is also in the public interest to prevent the enforcement of unconstitutional laws and to vindicate constitutional rights. The court therefore finds that the public interest would be served by a permanent injunction.

For the reasons explained in the preliminary injunction ruling, the court cannot sever the unconstitutional language from the regulations, but limits

the injunction to the challenged sections of Rule 52. However, because the court has found that §§ (A)(2), (B)(2), and (B)(3) of Rule 52 are unconstitutionally overbroad, the club owners may assert the First Amendment rights of parties not before the court; the court's entry of an injunction therefore means that "any enforcement [of the challenged sections] is totally forbidden." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

III. Conclusion

For the foregoing reasons, and for the reasons stated in the preliminary injunction order, the court:

(1) converts the preliminary injunction into a permanent injunction;

(2) Declares the following portions of Ohio Administrative Code § 4301:1-1-52 unconstitutional: §§ (A)(2), (B)(2), and (B)(3);

(3) permanently enjoins the enforcement of §§ (A)(2), (B)(2), and (B)(3) anywhere in the state of Ohio; and

(4) enters final judgment in favor of the plaintiffs.

This order is final and appealable.

IT IS SO ORDERED.

/s/ Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

Dated: January 3, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

J.L. SPOONS, INC., et al.,

Plaintiffs,

vs.

KENNETH MORCKEL, et al.,

Defendants.

Case Nos. 1:98CV2857
1:04CV0314

Judge Ann Aldrich

MEMORANDUM AND ORDER

This action represents the latest challenge to a series of efforts by the State of Ohio and its agents to craft regulations limiting the display of nudity and sexual behavior in liquor–serving establishments. This Court has previously invalidated portions of Ohio Administrative Code § 4301:1-1-52 ("Rule 52") as unconstitutional. *See J.L. Spoons, Inc. v. City of Brunswick*, 181 F.R.D. 354 (N.D. Ohio 1998)("*Spoons I*"); *J.L. Spoons, Inc. v. O'Connor*, 190 F.R.D. 433 (N.D. Ohio 1999)(granting preliminary injunction)("*Spoons II*") and *J.L. Spoons, Inc. v. O'Connor*, 194 F.R.D. 589 (N.D. Ohio 2000)(converting preliminary injunction into permanent injunction)("*Spoons III*"). Plaintiffs bring this action to challenge the constitutionality of a newly-enacted version of Rule 52.

Plaintiffs in this case include J.L. Spoons, Inc., Entertainment USA, and SSY, Inc., holders of state-issued permits for the on-premises consumption of alcohol and operators of upscale "gentleman's clubs," each of whom, according to the Complaint in Case No. 04CV314, "present[s] artistic and choreographed non-obscene dance

performances to its patrons by women who, in the course of their performances, appear topless and/or in g-strings and/or nude." Also appearing as a plaintiff is the Buckeye Association of Club Executives ("BACE"), a nonprofit organization created to represent the interests of similar club owners. These parties will be hereinafter referred to as "the club owners."

On February 18, 2004, this Court granted the club owners' request for a temporary restraining order, finding (following a hearing on the matter) that the enactment, adoption, and threatened enforcement of Rule 52 carried the potential to cause them irreparable harm (Docket No. 12). On March 18, 2004, with the agreement of the parties, the Court mandated that this order remain in force until April 1, 2004.

Now before the Court are two matters: the club owners' motion for a preliminary injunction (Docket No. 9 in Case No. 04CV314), and their motion for an order to show cause why defendants should not be held in contempt (Docket No. 68 in Case No. 98CV2857). On March 11 and March 12, 2004, the Court heard testimony from several witnesses, and argument from the parties, on each of these matters.

For the following reasons, this Court enjoins the defendants from enforcing Sections (A)(2), (B)(2), and (B)(3) of Rule 52, and denies the plaintiffs' motion for an order to show cause why defendants should not be held in contempt.

I. Facts and Procedural History

The Court last considered these issues on July 5, 2000, when it permanently enjoined the enforcement of sections

(A)(1), (A)(3), (B)(1) (in part), (B)(2), (B)(3), and (B)(7) of Rule 52, finding them invalid under the First and Fourteenth Amendments to the United States Constitution. *Spoons III*. In response to this decision, the Ohio Liquor Control Commission (together with its individual members, the Ohio Department of Public Safety, and Director Kenneth Morckel, hereinafter "the State") commenced proceedings for the enactment of a new version of Rule 52[1].

On September 11, 2003, a public hearing was conducted before the Ohio Liquor Control Commission, at which the Commissioners took documents into evidence and heard testimony from four witnesses on the subject of the potential validity and effectiveness of proposed new language for Rule 52.[2] At this hearing, Mark Anderson, Executive Director of the Ohio Liquor Control Commission, testified that the prior version of Rule 52 had been rescinded, and that all filing requirements set forth by the Ohio Revised Code had been met with regard to the new version of the Rule.

Witnesses for the public at the September 11 hearing included David Raber, a former assistant attorney general who testified regarding sections of Rule 52 not at issue in this case, and Ed Duvall of the Ohio Department of Public Safety, who testified that his agents "anxiously await a clear and concise set of guidelines ... on what is acceptable

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[1] At the March 11 Hearing, counsel for the State contended that the proceedings were commenced pursuant to a "five-year mandatory rule review." The impetus for commencement is not crucial to the Court's decision in this matter.

[2] Counsel for the State explained at the March 11 Hearing that the new language was drafted by an assistant Ohio attorney general.

contact, conduct, in a bar." Transcript of Official Hearing, Appendix 1 to Docket No. 18, Case No. 04CV314 ("Transcript"), at 69.

The bulk of the testimony heard by the Commission was provided by attorney Bruce A. Taylor of Fairfax, Virginia. Mr. Taylor introduced himself as "an attorney with a background in prosecuting a lot of different vice crimes, including obscenity and prostitution and some liquor violations," Transcript at 11, and then spoke at length about his understanding of precedent in this area of the law, and his impression of the potential reach of liquor regulations under the United States Constitution. In Mr. Taylor's opinion, "nude dancing does contribute to its own types of secondary effects and to a greater degree than other liquor bars that don't have nude dancing." Transcript at 18. Mr. Taylor
continued:

> The amount of prostitution, the amount of drug traffic, the amount of fights and brawls that occur in and around bars or juice bars that have nude dancing is an escalated statistical number, and it's not sort of an uncommon or unreasonable result to imagine, because sexual performances tend to excite sexual thoughts and feelings in men who are the predominant customers of these kinds of places.
>
> It is the purpose of the business to excite the male customers into giving up their money to the dancers. That's the whole purpose of having girls – and young girls, you don't see anybody who is our mother or wife or, you know, grown-up women don't dance in these places; these are for young girls to dance to either young men or older men or middle-aged guys, and it's designed to

> cause sexual excitement, and that sexually charged atmosphere then contributes to some of the other harms and crimes that we see in the statistics[.]

Transcript at 18-19. As a result of the link between nude dancing and adverse secondary effects thus postulated, Mr. Taylor expressed his opinion that the language under consideration by the Commission would be held constitutional. In fact, Mr. Taylor believed that the Commission would do well to enact

> a rule ... that would put into place regulations on liquor permit holders in Ohio that was [sic] in existence throughout the '60s and '70s and '80s, which is, that if you're going to have a liquor permit in Ohio, your girls are going to have to wear what amounts to a bikini top.

Transcript at 48.

Following an additional period for comment and consideration[3], the new version of Rule 52 was finalized

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[3] The Liquor Control Commission rejected requests by the Ohio Licensed Beverage Association and the BACE to delay for 90 days its forwarding of new Rule 52 to the Joint Committee on Agency Rule Review. The delay had been requested to allow review of the proposed language by these organizations and their legal counsel. Defendants' Exhibits B, F, and G.

On October 3, 2003, the Commission announced its intent, at the behest of the Joint Committee for Agency Rule Review, to re-file new Rule 52. Input was solicited from counsel for the plaintiffs, among others, at an informal meeting held in Columbus on October 16, 2003. Additionally, exhibits submitted by the State reveal the Commission's solicitation of new input on Rule 52 from the Ohio Association of Chiefs of Police, the Ohio Municipal League, the Ohio Prosecuting

and filed on February 9, 2004. Rule 52, including new prohibitions on "nudity" and "sexual activity," was scheduled to take effect on February 20, 2004.

The club owners brought this suit after learning of plans "for enforcement agents ... to investigate adult nightclubs in Cleveland, Columbus, Toledo, and Dayton, all on Friday, February 20, 2004" and to issue citations for violations of Rule 52 at that time. Declaration of Greg Flaig, publisher of *Ohio Night Dreams*, Appendix 1 to Docket No. 1, Case No. 04CV314, at 2.

The club owners claim that the new sections of Rule 52 concerning "nudity" and "sexual activity" are at least as broadly restrictive of protected expression as those held unconstitutional by this Court in 2000. They seek a declaratory judgment that these sections are unconstitutional, and a permanent injunction against their enforcement.

After granting the club owners' request for a temporary restraining order, this Court scheduled a preliminary injunction hearing for March 11 and 12, 2004.[4]

Attorneys Association, the County Commissioners' Association of Ohio, the Ohio Township Association, the Buckeye State Sheriffs' Association, and a group called Citizens for Community Values. Defendants' Exhibit Y.

While the State did not submit any evidence of changes proposed by these groups, the record does disclose the Commission's rejection of alterations removing certain of the prohibitions on nudity and sexual contact suggested by the Ohio Licensed Beverage Association. Defendants' Exhibit A.

[4] At the same hearing, counsel for both parties agreed to present their arguments on the propriety of a contempt sanction, as requested by the club owners in Case No. 98CV2857. Therefore, no

At that hearing, counsel submitted evidence and presented their arguments to the Court regarding the constitutionality of Rule 52.

The club owners called Dr. Judith Hanna, Ph.D., a cultural anthropologist and sociologist who researches and writes extensively on dance, arts, and society. Dr. Hanna discussed her experience attending and studying clubs such as those run by the plaintiffs,[5] and testified on the artistic value of exotic and erotic dance and the array of potential messages conveyed by the performance of dancers at such establishments. Dr. Hanna also discussed a variety of mainstream ballet, modern dance, and theater performances which involve the types of nudity and sexual contact prohibited by Rule 52.

The club owners also presented testimony by Dr. Daniel G. Linz, Ph.D., a sociologist and psychologist who specializes in the field of law and society. Dr. Linz presented the results of numerous peer-reviewed studies undertaken by him (in conjunction with several colleagues), which attempt to gauge the impact of the presence of adult cabarets on the "adverse secondary effects" claimed by the State as a rationale for its enactment of Rule 52. Dr. Linz reviewed the methodology employed by experts in this area, including the errors common to previous reports. He then described how his studies, conducted in Indiana, Florida, North Carolina, and each of four Ohio cities (Toledo, Columbus, Cleveland,

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separate hearing is required for the Court to resolve that issue.

[5] This Court has previously noted Dr. Hanna's broad base of experience with studying the cultural underpinnings of dance, and her particular specialized knowledge in the area of exotic and erotic dance. *See Spoons II*, 190 F.R.D. at 437.

and Dayton), showed no positive correlation, and in some instances a negative correlation, between the presence of liquor-serving establishments featuring nude or semi-nude dancing and the types of crime cited by the State.

In support of Rule 52, the State presented testimony by Scott Pohlman of the Ohio Department of Public Safety. Mr. Pohlman described the types of illicit behavior he has personally observed as an enforcement agent entering liquor-serving establishments which feature nude or semi-nude dancing, and offered his opinion as to the need for a provision like Rule 52 in order to limit these types of behavior

Finally, the State called Mark Anderson, Executive Director of the Liquor Control Commission, who testified as to the procedural steps undertaken in filing new Rule 52, and the intentions of the Commission in enacting and enforcing the Rule.

Following this evidentiary hearing, the State agreed to refrain from any enforcement of Rule 52 until at least April 1, 2004, in order to grant the Court sufficient time to enter a ruling on the club owners' motion for a preliminary injunction.

II. Discussion

The club owners challenge sections (A)(2), (B)(2), and (B)(3) of new Rule 52, which read as follows:

> (A) Definitions as used in this rule:
>
> (2) "Nudity" means the showing of the human male or female genital, pubic area or buttocks

> with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple and/or areola; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum, anal region, or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of the nipples and/or areola.
>
> (B) Prohibited activities: no permit holder, his agent, or employee shall knowingly or willfully allow in and upon his licensed permit premises any persons to:
>
> (2) Appear in a state of nudity;[6]
> (3) Engage in sexual activity as said term is defined in ORC Chapter 2907;[7]

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[6] Section (B)(2) is limited only by section (B)(8), which states that the prohibition on nudity "shall not apply to any individual exposing a breast in the process of breastfeeding an infant under two years of age."

[7] The club owners do not challenge sections (A)(1) and (B)(1) of Rule 52, which deal with limiting "disorderly activities;" nor do they challenge sections (B)(5) through (B)(7), which cover drugs, theft, and improper use of food stamps and other state benefits.

Nor do the club owners challenge section (B)(4) of Rule 52: "no permit holder, his agent, or employee shall knowingly or willfully allow in and upon his licensed permit premises any persons to [c]ommit Public Indecency, as said term is defined in ORC Chapter 2907." (ORC Chapter 2907 defines "public indecency" as:

> recklessly do[ing] any of the following, under circumstances in which [one's] conduct is likely to be

The Ohio Revised Code defines "sexual activity" as:

> vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

"Sexual contact" is defined as: any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."[8]

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viewed by and affront others, not members of his or her household:

(1)Expose his or her private parts, or engage in masturbation;

(2)Engage in sexual conduct;

(3)Engage in conduct that to an ordinary observer would appear to be sexual conduct or masturbation.)

This is presumably because the club owners are not in reasonable apprehension of prosecution under section (B)(4). Patrons of the establishments owned by plaintiffs are, by nature and by definition, not likely to be affronted by the nudity on display there. The sections of Rule 52 at issue here do not contain any similar requirement that viewers be affronted to trigger their enforcement.

[8] The Court previously invalidated, as unconstitutional, the following portions of Rule 52:

(A) Definitions as used in this rule:

(1) "Lewd activities" are those activities (including those which are electronically reproduced) that contain lustful,

As in the previous action, the club owners contend that these provisions are unconstitutional under the First and Fourteenth Amendments to the United States Constitution, both as applied to the plaintiffs' establishments, and facially (as impermissibly overbroad).[9] As in the previous action, the club owners seek an injunction against the enforcement of the challenged provisions. The club owners also seek a finding of contempt against the State, for violation of this Court's previous order invalidating portions of Rule 52.

> lascivious or lecherous behavior and includes, but is not limited to acts of, or acts that simulate, sexual intercourse, masturbation, sodomy, bestiality, or oral copulation.
>
> . . .
>
> (3) "Nudity" is the showing (including electronically showing) of the human male or female genitals, pubic area or buttocks (or anus) with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple and/or areola, or the showing of the covered male genitals in a discernibly turgid state.
>
> (B) Prohibited activities: no permit holder, his agent, or employee shall knowingly or willfully allow in and upon his licensed permit premises any persons to:
>
> (1) engage in any lewd . . . activities;
> (2) appear in a state of nudity;
> (3) touch, fondle, or caress the genitals, pubic area, buttocks, or female breasts of any person;
>
> . . .
>
> (7) commit improper conduct of any kind, type, or character that would offend the public's sense of decency, sobriety or good order.

Ohio Admin. Code 4301:1-1-52 (1998).

[9] As in the previous action, the plaintiffs have standing to bring these claims. *See* Case No. 98CV2857, Docket No. 24, at 5-7.

A. The Motion for a Preliminary Injunction

In deciding whether to grant a preliminary injunction,

> a district court must give consideration to four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction. Federal Rule of Civil Procedure 52(c) requires a district court to make specific findings concerning each of these four factors, unless fewer are dispositive of the issue.

ACLU v. McCreary County, 354 F.3d 438, 445 (6th Cir. 2003), citing *Rock & Roll Hall of Fame & Museum, Inc. v. Gentile Prods.*, 134 F.3d 749, 753 (6th Cir. 1998), *In re DeLorean Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985). In cases involving the First Amendment, the crucial inquiry is usually whether the plaintiffs have demonstrated a substantial likelihood of success on the merits. This is so because the issues of the public interest and harm to the respective parties largely depend on the constitutionality of the statute. *Id.*, citing *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998), *cert. denied*, 119 S.Ct. 1496 (1999).

1. Substantial Likelihood of Success on the Merits

a. The As-Applied Challenge

The club owners first claim that the challenged sections of Rule 52 represent an impermissible violation of

their right to freedom of speech and expression under the First Amendment.

The constitutional landscape in this area remains marred by the Supreme Court's inability to reach consensus, and the fragmentary opinions this creates. Once again, both parties to this dispute must rely extensively on the principle that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of the five Justices, the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds." *Triplett Grille v. City of Akron*, 40 F.3d 129, 132 (1994), quoting *Marks v. United States*, 430 U.S. 188, 193 (1977).

Yet this guidance does not always guarantee consistent results. For example, while the Sixth Circuit has ruled Justice Souter's opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), to be the narrowest, and thus controlling, *see Spoons II*,190 F.R.D. 433 at 439 n.8, the Pennsylvania Supreme Court apparently found that "aside from the agreement by a majority of the Barnes Court that nude dancing is entitled to some First Amendment protection, we can find no point on which a majority of the *Barnes* Court agreed." *City of Erie, et al. v. Pap's A.M.*, 529 U.S. 277 (2000), quoting *Pap's A.M. v. City of Erie*, 553 Pa. 348, 358 (Pa. 1998).

With this caveat in mind, two recent Supreme Court decisions bear noting. The first, *City of Erie*, was specifically considered by this Court in a prior decision. *See Spoons III*, 194 F.R.D. at 592. The Court adheres to its prior assessment that the decision in *City of Erie* is thoroughly consistent with Justice Souter's opinion in *Barnes*. The second case, *City of Los Angeles v. Alameda*

Books, Inc., 535 U.S. 425 (2002), has been decided since our last examination of these issues. The Court agrees with the parties that Justice Kennedy's opinion in that case is controlling under the rule of *United States v. Marks*.

There is no dispute about the protected status of nude dancing under the First Amendment. The plaintiffs, through their dancers and patrons, enjoy "a degree of First Amendment protection" in presenting non-obscene, erotic dancing at their cabarets. *Barnes*, 501 U.S. at 581 (1991). The First Amendment protects erotic dance that is enhanced by nudity, though such expressive activity falls "within the outer perimeters of the First Amendment," *id.* at 566, and is generally afforded less protection than, for example, pure political speech. While Rule 52 is primarily concerned with regulating conduct, it nonetheless impacts the club owners' rights to free speech.

There appears to be no claim that the new version of Rule 52 is a content-based restriction on speech. Instead, the parties argue the as-applied challenge within the framework laid out by *City of Erie* and Justice Souter's opinion in *Barnes*. *Cf. Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir. 1998) (adult entertainment regulations are usually treated as content neutral).

This framework, in turn, relies heavily on the four-part test announced in *United States v. O'Brien*, 391 U.S. 367 (1968). Under the *O'Brien* test, a constitutional regulation must (1) be within the government's constitutional power; (2) further an important or substantial governmental interest; (3) be justified by an interest unrelated to the suppression of free expression; and (4) ensure that the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest. *Id.* at 376-77; *Barnes*, 501 U.S. at 567.

Application of Rule 52 to establishments that provide erotic dancing must be based on the state's "substantial interest in combating the secondary effects of adult entertainment establishments." *Barnes*, 501 U.S. at 582; *see also Triplett Grille*, 40 F.3d at 134. The ruling in *City of Erie*, which dealt exclusively with an as-applied challenge, reaffirmed the power of states to regulate expressive behavior in order to combat "the secondary effects [of such behavior], such as the impacts on public health, safety, and welfare." 529 U.S. at 291, citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 50 (1986). In *Alameda Books*, Justice Kennedy addressed (within the zoning context) the volume of evidence necessary to justify a regulation based on secondary effects.

Evaluation of the as-applied challenge to Rule 52 must therefore rest largely on the *O'Brien* test and Justice Kennedy's opinion in *Alameda Books*.

To begin with the *O'Brien* test: It remains clear that promulgation of Rule 52 is within the State of Ohio's police power. *See Barnes*, 501 U.S. at 567. States have the inherent power to regulate harmful conduct; this power is not diminished by a state's decision to exercise it via the mechanism of liquor regulation. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515 (1996).

Similarly, Supreme Court jurisprudence in this area generally counsels that the State's interest in controlling adverse secondary effects is important and substantial, and that it should be viewed as "unrelated to the suppression of free expression." *See Virginia v. Black*, 123 S. Ct. 1536, 1562, n. 2 (U.S. 2003), *citing Renton*, 475 U.S. at 48. *But see Alameda Books*, 535 U.S. at 453 (Souter, J., dissenting)(questioning intermediate scrutiny for regulations "not uniformly distinct from the content based

regulations calling for scrutiny that is strict"); *Barnes*, 501 U.S. at 587 (White, J., dissenting)(disputing analysis under O'Brien; finding nudity itself expressive, rather than merely incidental "conduct"). New Rule 52 therefore appears to satisfy the second and third prongs of the *O'Brien* test.

With regard to the fourth prong, this Court previously held that the plaintiffs could not demonstrate a substantial likelihood of success (except on a catch-all provision, § (B)(7), since removed from the Rule). *Spoons II*, 190 F.R.D. at 439-40. As the Court will discuss *infra*, it is possible that some of the new restrictions, *e.g.* those on exposure of the buttocks, or the wearing of a costume simulating nudity, burden the plaintiffs' ability to communicate their message of eroticism more substantially than the Constitution allows. This possibility is mitigated somewhat by the Supreme Court's ruling in *City of Erie*, which found similar language regarding costumes and opaque coverings to be an incidental restriction on First Amendment freedoms no greater than that essential to furtherance of the state's interest.[10]

The Court acknowledges, however, that the club owners might establish a strong likelihood of success on the merits of their as-applied challenge if they could show that no restriction of their First Amendment rights is "essential to the furtherance" of the State's interest – *i.e.*, if they could thoroughly refute the State's claims that prohibitions on nudity in alcohol-serving establishments

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[10] It bears noting, however, that the Court in *City of Erie* appeared to rely on an interpretation by the Pennsylvania Supreme Court in reading the "opaque covering" language to require only the wearing of pasties and G-strings. No such limiting construction is available to the Court in this matter.

somehow serves to reduce crime in the vicinity of those establishments. Clearly, the studies and testimony of Dr. Linz were presented to the Court in service of this goal.

Yet the Court also notes that the Supreme Court has advocated great deference to state and city governments in this area. In *Alameda Books*, Justice Kennedy reiterated that, in zoning to reduce secondary effects, "a city must have latitude to experiment, at least at the outset, and ... very little evidence is required." 535 U.S. at 451, citing *Renton,* 475 U.S. at 51-52. "As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners. [I]f [the city's] inferences appear reasonable, we should not say there is no basis for its conclusion." *Id.* at 451-52. Applying these principles, Justice Kennedy approved of Los Angeles's reliance on "a single study and common experience." *Id.*

Here, the State has offered personal experience in the form of testimony by Scott Pohlman of the Ohio Department of Public Safety, who spoke at length on the types of abuses he has witnessed in liquor-serving establishments that feature nude or semi-nude dancing (Transcript of March 12 Hearing, at 88-102), and Bruce Taylor, who both testified before the Liquor Control Commission on his experiences as a prosecutor, and offered affidavits and other documentary evidence on the links between sex and drug offenses, prostitution, and adult cabarets. Assuming the State did in fact rely on this evidence in making its decision to enact new Rule 52, the club owners may have difficulty persuading the Court that the Commission's procedures were any more methodologically unsound than those followed by the City of Los Angeles.

Even greater uncertainty is sure to attend any attempt to evaluate the more empirical evidence presented by the parties. To paraphrase Justice Kennedy, the State's "single study" in this case appears to be one conducted by the Sheriff's office of Adams County, Colorado, and it must be contrasted with the thorough investigation of crime rates (and contributing factors to the crime rates) undertaken by Dr. Linz in and around four major Ohio cities.

Dr. Linz's study shows a lack of correlation between the presence of liquor-serving establishments featuring nude or semi-nude dancing and the types of crime the State seeks to reduce. (*See* Transcript of March 12 Hearing, at 25-56). In Toledo, Dr. Linz's hierarchical regression analysis revealed that the presence or absence of adult cabarets in a given neighborhood did approximately nothing to explain the presence of crime in that same neighborhood. Transcript of March 12 Hearing at 39, 45-46. Similarly, in Columbus, the addition of "alcohol-serving adult cabarets" as a factor in Dr. Linz's analysis resulted in approximately "zero explanatory power." Transcript of March 12 Hearing at 46. In Dayton, Dr. Linz's work revealed a negative correlation between adult cabarets and incidents of rape, such that "the presence of [an alcohol-serving adult entertainment] establishment is actually indicative of less rather than more rape events."

Transcript of March 12 Hearing at 52. Finally, in Cleveland, Dr. Linz found that the addition of "alcohol-serving adult cabarets" as a factor in his analysis also added "no ability to [explain] crime incidents." Transcript of March 12 Hearing at 54.

The Court is uncertain to what extent the Supreme Court would advocate that we simply approve the State's

reliance on "propositions ... well established in common experience and ... zoning policies that we have already examined," Alameda Books, 535 U.S. at 453, and ignore the implications of more persuasive, if counterintuitive, evidence like Dr. Linz's study[11]. Clearer guidance in this area would greatly aid the Court in determining whether the club owners have established a strong likelihood of success on a claim that no restriction on nudity could possibly further the State's interest in reducing secondary effects.

However, the Court need not finally resolve the as-applied issue at this juncture. An injunction must issue because the club owners have shown a strong likelihood of success on their claim that the challenged sections of Rule 52 are unconstitutionally overbroad, and because they are likely to suffer irreparable harm in the absence of

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[11] Dr. Linz suggested that the negative correlation between adult establishments and violent crime March 28, 2004 might be explained by the fact that

> in alcohol serving establishments that do not feature adult entertainment, people fight with one another particularly men over women. They fight about a person looking at my girlfriend ... my girlfriend looking at you, you standing too close to my girlfriend, you making eyes at my girlfriend. None of that exists in an adult entertainment venue. There is no opportunity to fight over the women because the women in terms of entertainment, expression of ideas about sexuality and eroticism are available for public consumption. There's no need to hassle, tussle, or fight over dates or over one person encroaching on the territory of another, which are the reason that most men fight in bars and parking lots of bars. All of that is removed in an adult location.

Transcript of March 12 Hearing at 50.

injunctive relief.

b. The Facial Challenge

First it should be noted that neither *Alameda Books* – in which the Supreme Court examined a zoning regulation – nor *City of Erie* involved a challenge similar to that raised here by the club owners, namely that Rule 52 is unconstitutional on its face, because the challenged sections are overbroad.[12]

The constitutional landscape in this area is therefore dominated by *Triplett Grille*, which provided the foundation for much of the Court's previous ruling on Rule 52, and which continues to state the Sixth Circuit's interpretation of the law on overbreadth. A comparison of the new provisions of Rule 52 to those previously invalidated reveals the new language to be no more constitutionally sound under the mandate of *Triplett Grille*. The Court therefore finds it probable that the plaintiffs will prevail on their argument that the challenged sections are overbroad.

This Court has summarized the applicable law as follows:

> A government regulation is facially overbroad when there exists "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court." *City of Los Angeles*

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[12] In fact, Justice O'Connor's opinion in *City of Erie* explicitly noted that, following the approach taken by the Pennsylvania Supreme Court, the Court "did not address ... the claim that the ordinance is unconstitutionally overbroad." 529 U.S. at 286.

v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984). To be unconstitutionally overbroad, a regulation's overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

The plaintiffs' overbreadth challenge is controlled by the Sixth Circuit's decision in *Triplett Grille*. In that case, the Sixth Circuit invalidated on overbreadth grounds an Akron ordinance that prohibited public displays of nudity and sexual conduct. *See Triplett Grille,* 40 F.3d at 135-36. The court reasoned as follows:

> The Akron public indecency ordinance at issue here prohibits all public nudity, including live performances with serious literary, artistic, or political value. The ordinance makes no attempt to regulate only those expressive activities associated with harmful secondary effects and includes no limiting provisions. Instead, Akron's wide ban on public nudity sweeps within its ambit expressive conduct not generally associated with prostitution, sexual assault, or other crimes.

Id. at 136. The Sixth Circuit noted that in *Barnes*, when indicating that there was no overbreadth claim before the Supreme Court, Justice Souter had observed that "[i]t is difficult to see . . . how the enforcement of Indiana's statute against nudity in a production of 'Hair' and 'Equus' somewhere other than an 'adult' theater would further the State's interest in avoiding harmful

> secondary effects . . . ." *Barnes*, 501 U.S. at 585, n.2 (Souter, J., concurring); *Triplett Grille*, 40 F.3d at 136. Because the Akron ordinance in *Triplett Grille* covered artistic performances as well as adult entertainment, the Sixth Circuit found the ordinance to be overbroad in violation of the First Amendment. *Triplett Grille*, 40 F.3d at 135-36.

Spoons II, 190 F.R.D. at 441. The underpinnings of this analysis have not changed. The Court may therefore reasonably begin its examination by inquiring: what has changed about Rule 52?

i. Sections on "Lewd Activities"

The Commission has entirely removed the portions of Rule 52 dealing with the "simulation" of a variety of sexual behavior, and the showing of "electronically reproduced" images containing actual or simulated sexual activities. The Court, citing *Triplett Grille*, had previously held that these sections impermissibly curtailed a substantial amount of protected speech.

ii. Sections on Appearing in a State of Nudity

The Commission has replaced its prior definition of nudity with Section (B)(3) of Rule 52:

> "Nudity" means the showing of the human male or female genital, pubic area or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple and/or areola; the exposure of any device, costume, or covering which gives the appearance of or simulates the

> genitals, pubic hair, natal cleft, perineum, anal region, or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of the nipples and/or areola.

This definition is even broader than the version found by this Court to reach a substantial amount of protected conduct. The only language removed by the Commission is that regarding electronic reproductions, and a phrase regarding the appearance of the covered male genitals in a "discernibly turgid state."

Contrarily, Section (B)(3) now includes additional restrictions on nudity-simulating "devices, costumes, or coverings," a phrase which expands the applicability of the Rule to include a variety of non-nude entertainment.

The relevant question remains whether the regulation "reaches a substantial amount of constitutionally protected conduct," such that it threatens to chill the exercise of protected expressive activity. *City of Houston v. Hill*, 482 U.S. 451, 458 (1987); *see also Southwest Ohio Reg'l Transit Auth.*, 163 F.3d at 361. The plaintiffs in this case have demonstrated that §§ (A)(3) and (B)(2) reach a substantial amount of protected conduct.[13]

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[13] As the Court previously noted:

> Considering the prevalence of liquor permits, and the dearth of evidence that harmful secondary effects are associated with anything other than adult entertainment businesses, there is no reason to force theaters, comedy clubs, and similar establishments to choose between possessing liquor permits or presenting performances that might fall within the

The Court previously noted:

> A variety of artistic performances, including the oft-cited *Hair* and *Equus* as well as smaller productions like Karen Finley's one-woman shows, are constitutionally protected and involve nudity. Yet Rule 52 makes no exception for such artistic performances. When a regulation sweeps in performances that fall outside the rubric of adult entertainment, the regulation is vulnerable to an overbreadth attack.

Spoons II, 190 F.R.D. at 442, citing *Farkas v. Miller*, 151 F.3d 900, 905 (8th Cir. 1998), *Triplett Grille*, 40 F.3d at 135-36. New Rule 52 continues to make no exception for artistic performances, and therefore continues to sweep in performances that fall outside the rubric of adult entertainment, and to reach a substantial amount of constitutionally protected conduct.

Testifying at the March 11 evidentiary hearing, Dr. Hanna brought to the Court's attention numerous examples of mainstream theater and dance which contain nudity and/or sexual contact as prohibited by Rule 52. These included *Prodigal Son*, Paul Taylor's *Big Bertha*, *Mutations*, and the recent off-Broadway hit *Puppetry of the Penis*. *See* Transcript of March 11 Hearing, at 24-30. Touring productions of *O Calcutta!* would continue to be

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> proscriptions of Rule 52. The fact that *Hair* may be presented at a venue without a liquor permit is of limited significance when the plaintiffs have shown that, in fact, many major entertainment venues possess liquor permits that cover performance areas.

Spoons II, 190 F.R.D. at 442 n.11.

at risk under this version of the rule, as would a man dropping his pants as part of a comedy routine. The State acknowledges as much (though, it claims, the Rule applies "only if the man is completely bereft of the most minimal underwear when he drops his pants").[14]

The Court attaches no significance to the State's promise that "enforcement ... will continue solely against the type of establishment generally associated with negative secondary effects," given
the Sixth Circuit's reminder that courts need "not presume that the public official responsible for administering a legislative policy will act in good faith and respect a speaker's First Amendment rights." *United Food & Commer. Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998). In fact, the State's good faith on this score is explicitly contradicted by the history of Rule 52, which reveals the commencement of a prosecution against *O Calcutta*! Transcript of March 12 Hearing at 104-05.

Indeed, were Rule 52 to be found constitutional, the State has acknowledged that it would be obligated under ORC §5502.02 to enforce the Rule against any and all liquor permit holders in Ohio. *See* Transcript of March 12 Hearing at 111-13; Plaintiff's Exhibit 17. Permit holders to whom the State's restrictions on nudity and "sexual conduct" would apply include Jacobs Field, Gund Arena,

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[14] It is difficult to adequately express the extent to which this attempt at reassurance by the State misses the point. The comedic value of any hypothetical pants-dropping bit would be entirely removed if the comedian were required to wear underwear – especially if said underwear could not "simulate the appearance of" the nudity sought to provoke a laugh. Without said comedic value, the comedian's ability to convey his message would be utterly impaired.

the Beachland Ballroom, Great Lakes Science Center, Akron Civic Theater, Cain Park Amphitheater, the Cleveland Museum of Art, and each of the theaters operated by the Playhouse Square Foundation. Transcript of March 12 Hearing at 115-19.

If enforced, Rule 52 risks suppression of a significant quantum of protected expression at these and many other venues, all of which present the types of performances described by Dr. Hanna as well within the mainstream of American artistic entertainment. This risk is only amplified by new language in the Rule prohibiting nudity-simulating costumes, which as Dr. Hanna testified could include the body suits and leotards worn by ballet and modern dancers and even cheerleaders. Transcript of March 11 Hearing at 31-32.

To advance its substantial interest in the reduction of adverse secondary effects, the State may prevent erotic dancers from appearing totally nude. However, in so doing, the State may not curtail a substantial amount of protected expression outside the realm of adult entertainment. *Triplett Grille*, 40 F.3d at 136. By substituting broader language covering non-nude performances, and by failing to in any way address the Court's clearly articulated concern for exempting mainstream artistic performances, the State appears to reach well beyond the realm of speech reasonably associated with the secondary effects it seeks to curtail. The Constitution does not countenance such overreaching, and the club owners are therefore likely to prevail on their claim that Sections (A)(3) and (B)(2) of Rule 52 are unconstitutionally overbroad.

iii. Sections on Sexual Activity

The Commission has replaced its prohibition on touching, fondling, or caressing the genitals, pubic area, buttocks, or female breasts of any person with new Section (B)(3), comprising the following language: "no permit holder, his agent, or employee shall knowingly or willfully allow in and upon his licensed permit premises any persons to [e]ngage in sexual activity as said term is defined in ORC Chapter 2907." "Sexual Activity" is defined by Ohio Revised Code Chapter 2907 as "sexual conduct or sexual contact, or both."

"Sexual conduct," in turn, is defined as:

> vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

And "sexual contact" is defined as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."

Once again, the new language easily lends itself to even broader interpretation and application than that previously declared unconstitutional by this Court. Because the State still has not seen fit to include an exception for artistic performance, Section (B)(3) continues to carry a risk of enforcement against ballet and

modern dance performances, in which participants are frequently required to "touch" the "erogenous zones" of one another. As Dr. Hanna explained, the requirement that such touching be "for the purpose of sexually arousing or gratifying" does not constitute a substantial limitation on the Section. *See* Transcript of March 11 Hearing, at 34-35. In fact, one might easily posit a nearly unlimited number of contexts in which performers undertaking clearly protected forms of expression might seek to convey a message via the "gratifying" "touching of an erogenous zone of another, including without limitation the thigh."

Perhaps even more troubling is the position into which new Section (B)(3) forces permitholders with regard to their patrons. Under a reasonable reading of the Rule, a bar owner who witnesses patrons flirtatiously touching one another, on any potentially "erogenous" part of the body, including without limitation the thigh, must take an affirmative step to end this conduct. Under such circumstances, the owner would be forced to choose between losing his liquor license or infringing on his patrons' freedom of association.

Although the removal of language specifically prohibiting self-touching might assuage the Court's stated concern for Michael Jackson's "famous groin-grabbing dance move," *Spoons II*, 190 F.R.D. at 443, the State has substituted language which is in many ways more clearly unconstitutional, allowing as it does the suppression of the wide variety of messages which require pleasurable touching of some sort for their communication.[15]

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[15] In the previous action, the Court expressed concern over the applicability of language prohibiting self-touching to baseball players adjusting their equipment following a play. *Spoons II*, 190 F.R.D. at 443, n. 13. The substituted language no longer risks chilling

Again, *Triplett Grille* continues to state the law in this Circuit regarding overbreadth, and Section (B)(3) new Rule 52 is in many ways even broader than its predecessor, seeking as it does to prohibit all manner of pleasurable touching in liquor-serving establishments, simply by reference to the ambiguous phrase "erogenous zones." As in *Triplett Grille*, "The ordinance makes no attempt to regulate only those expressive activities associated with harmful secondary effects and includes no limiting provisions. Instead, [it] sweeps within its ambit expressive conduct not generally associated with prostitution, sexual assault, or other crimes." 40 F.3d at 136. Thus the Court finds that the club owners have shown a strong likelihood of success on their facial challenge to this provision.

iv. Catch-All Provision

The Commission has removed prior Section (B)(7), on committing "improper conduct of any kind, type, or character that would offend the public's sense of decency, sobriety or good order." The Court previously enjoined these provisions as likely to be found unconstitutional as applied.

Given the likely overbreadth of the above sections, this removal is insufficient to salvage the constitutionality of Rule 52.

2. Threat of Irreparable Harm to the Plaintiff

As explained above, the club owners are likely to prevail on their overbreadth challenge. The denial of

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this type of behavior, but might arguably apply to the ubiquitous butt-pats administered by athletes to one another, for the purposes of encouragement and positive reinforcement, if not "gratification."

constitutional rights has been held by numerous federal courts, including the Supreme Court, to constitute irreparable harm. Specifically, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). It follows, as a matter of law, that the plaintiffs will suffer irreparable harm if the State and its agents are not enjoined from enforcing the challenged sections of Rule 52.

3. Threat of Substantial Harm to the Defendants

This Court does not find that the State will suffer any appreciable amount of harm if it is enjoined from enforcing the pertinent sections of Rule 52. Therefore, the third factor considered regarding the issuance of a preliminary injunction favors the club owners.

4.Whether Injunctive Relief would Serve the Public Interest

Finally, it is in the public interest to prevent the enforcement of unconstitutional laws, and thereby uphold constitutional rights. Therefore, the fourth factor this Court must balance supports the issuance of a preliminary injunction.

B. The Motion to Find the State in Contempt

Both parties presented argument at the March 11 and 12 hearing on the availability of a contempt sanction against the State, for violation of the Court's previous order. Plaintiffs argue that such a sanction is appropriate because "the definition of nudity in the new regulation contains provisions which are in all material respects identical to those invalidated by this Court on July 5,

2000." The State counters that the new Rule is substantially different, and that it was enacted pursuant to valid procedures.

The validity of the State's procedures for enactment does not appear to be in doubt. What the Court must decide is whether, given a finding that the new Rule is unconstitutional, its similarity to the former Rule 52 would justify a finding that the State disregarded the prior mandate.

The club owners are correct that a finding of contempt is appropriate if the Court finds that the State "failed to take all reasonable steps within [its] power to comply with the court's order." *Harrison v. Metropolitan Gov't of Nashville & Davidson County, Tenn.*, 80 F.3d 1107, 1112 (6th Cir.), *cert. denied*, 519 U.S. 863, 117 S. Ct. 169, 136 L. Ed. 2d 111 (1996). "There is no requirement of willfulness to establish civil contempt, and the intent of a party to disobey a court order is irrelevant to the validity of a contempt finding." *Nettis Environmental, Ltd. v. IWI, Inc.*, 46 F. Supp. 2d 722, 726 (N.D. Ohio 1999), quoting *Rolex Watch U.S.A. v. Crowley*, 74 F.3d 716, 720 (6th Cir. 1996); *In re Jaques*, 761 F.2d 302, 306 (6th Cir. 1985).

The burden rests on the party seeking a contempt finding to establish violation of the previous order by clear and convincing evidence. *Glover v. Johnson*, 934 F.2d 703, 707 (6th Cir. 1991), citing *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 590 (6th Cir. 1987)). The club owners cannot carry this burden. The State has issued no citations and commenced no action under Rule 52 since this Court's last ruling. Transcript of March 12 Hearing at 104. And there is no evidence before the Court suggesting that agents of the State sought to prosecute violations of former Rule 52 on February 20. Finally, the club owners

have cited, and the Court could locate, no case in which a state government was held in contempt under similar circumstances.

Indeed, it would be difficult to conceive of any fashion in which the State might comply with a court order enjoining one of its regulations, except to refrain from enforcing the regulation, and to attempt to enact a more constitutionally acceptable substitute. This is what the State appears to have done here[16]. However short of the constitutional mark its efforts might have fallen, a finding of contempt is not justified.

Therefore, the Court denies the plaintiff's motion for an order to show cause why the defendants should not be held in contempt.

C. Scope of the Preliminary Injunction

Once more, the Court finds it impossible to sever the language likely be found unconstitutional from the specific subsections in which that language is contained. *See Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 202 (6th Cir. 1997), *cert. denied*, 118 S.Ct. 1347 (1998) (under Ohio law, severance may not fundamentally disrupt the statutory scheme or require the insertion of additional words). However, it is appropriate to limit the injunction to the challenged sections of the Rule. *See id.* Thus, this Court may enjoin Sections (A)(2), (B)(2), and (B)(3) without altering the meaning of, or otherwise disrupting,

---

[16] In fact, the Court takes the plethora of references to "Judge Aldrich" in the transcript of proceedings before the Liquor Control Commission as evidence (however circumstantial) of the State's efforts to comply with the previous ruling, and to avoid a similar ruling in the future.

the remaining portions of Rule 52.

Additionally, the Court agrees with the club owners that an injunction issued by this Court prohibits any enforcement of the challenged sections of Rule 52 by officers of the state of Ohio statewide. The club owners' overbreadth claim allows them to assert the First Amendment rights of parties not before the Court; the Court's entry of an injunction therefore means that "any enforcement [of the challenged sections] is totally forbidden." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

III. Conclusion

For the foregoing reasons, this Court denies the plaintiffs' motion for a finding of contempt, grants the plaintiffs' motion for a preliminary injunction, and enjoins the defendants from enforcing Sections (A)(2), (B)(2), and (B)(3) of Rule 52 anywhere in the state of Ohio.

A status call will be scheduled separately for purposes of determining whether any additional proceedings are necessary to reach a final decision on the merits.

IT IS SO ORDERED.

s/Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

Dated: April 1, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

J.L. SPOONS, INC., ET AL.,	)	Case No. 1:04CV0314
	)	
Plaintiffs,	)	Judge Ann Aldrich
	)	
v.	)	
	)	ORDER
KENNETH MORCKEL, ET AL.,	)	
	)	
Defendants.	)	
	)	

On February 17, 2004, plaintiffs J.L. Spoons, Inc., Entertainment USA of Cleveland, Inc., SSY, Inc., and the Buckeye Association of Club Executives ("plaintiffs") filed a verified complaint for a declaratory judgment, temporary restraining order, and preliminary and permanent injunctive relief, seeking to prevent enforcement by defendants of Ohio Admin. Code §4301-1-1-52 ("Rule 52"). Defendants include the Ohio Liquor Control Commission, the Ohio Department of Public Safety, and four individuals named in their official capacities as officers of those state agencies.

Plaintiffs claim that parts of Rule 52 are unconstitutional as an abridgement of free speech and due process under the First and Fourteenth Amendments to the Untied States Constitution. For the following reasons, this Court grants the motion for a temporary restraining order.

Background

On July 5, 2000, this Court invalidated several portions of the former version of Rule 52, as unconstitutional under the First and Fourteenth Amendments. *J.L. Spoons v. O'Connor*, 194 F.R.D. 589 (N.D. Oh. 2000). The Court also issued an injunction against the enforcement of Rule 52 by the Ohio Department of Public Safety and its director.

On February 9, 2004, the Ohio Liquor Control Commission filed a new version of Rule 52, including new prohibitions on "nudity" and "sexual activity." Ohio Admin. Code 4301-1-1-52, §§(B)(2) and (B)(3). Plaintiffs have claimed, both in their complaint and at a hearing before the Court held on February 17, 2004, that these new sections are at least as broadly restrictive of protected expression as those held unconstitutional in 2000.

Discussion

Plaintiffs allege that, as currently composed, Rule 52 is unconstitutionally overbroad; that it is unconstitutionally vague; that it is irrational, arbitrary, and capricious, and not in furtherance of a substantial government interest; and that it is not narrowly tailored to further any government interest. Plaintiffs also argue that Rule 52 unconstitutionally abridges freedom of speech and expression, in that it imposes an impermissible restraint on constitutionally protected expression, while failing to leave open alternative avenues of communication; and that it was adopted without relevant empirical information to support the State's claim that adult businesses cause adverse secondary effects.

In support of their request for temporary injunctive

relief, plaintiffs claim that the enactment, adoption and threatened enforcement of Rule 52 has caused and threatens to cause them irreparable harm, for which there is no adequate remedy at law.

In determining whether to grant a temporary restraining order, the Court considers the factors it would consider on a motion for a preliminary injunction: the movant's chance of success on the merits; the irreparable harm threatened; the adequacy of a legal remedy; and the public interest. If the harm threatened is especially grave, the Court need not require as strong a showing of likely success as it would when considering preliminary or permanent injunctive relief. *See Threesome Entertainment v. Strittmather,* 4 F. Supp. 2d 710, 716 (N.D. Oh. 1998), *citing In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985); *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982). If the other elements are present, all that is required is that the movant show "fair grounds for litigation." *Roth v. Bank of the Commonwealth*, 583 F. 2d 527, 536-37 (6th Cir. 1978).

Here, the Court finds that plaintiffs have shown that they will suffer irreparable harm. The sanctions available to the Liquor Commission for violation of Rule 52 could well cripple, or even destroy, the profit-making apparatus of both the named establishments and the members of the Buckeye Association. An award of damages after the fact would not adequately compensate for such harm. Moreover, plaintiffs' contention that the new provisions of Rule 52 do not represent a substantial improvement, on constitutional terms, over those invalidated in 2000, is at least "fair grounds for litigation." Any interest the public may have in earlier enforcement of Rule 52 does not outweigh the interest of plaintiffs in preserving the status quo pending determination of the constitutional issues

before the Court.

Conclusion

For the foregoing reasons, the Court grants plaintiffs' motion for a temporary restraining order. The Court orders that:

1. The defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this order (by personal service or otherwise) are enjoined from enforcing paragraphs (A)(2), (B)(2), and (B)(3) of Ohio Admin. Code §4301-1-1-52.

2. By agreement of the parties, this injunction shall remain in force for 31 days after its issuance.

3. The defendants shall file a response to the aforementioned pleadings of plaintiffs by March 1, 2004. Plaintiffs' reply brief shall be filed by March 5, 2004. An evidentiary hearing on the plaintiffs' claim for declaratory relief shall be held March 11, 2004, at 9:30 a.m. in Courtroom 17B, U.S. Courthouse, 801 West Superior Avenue, Cleveland, Ohio 44113-1839.

IT IS SO ORDERED.

s/Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT COURT

No.-07-3178

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

J.L. SPOONS, INC.,	)	FILED
	)	DEC 16, 2008
Plaintiff-Appellee,	)	LEONARD GREEN, Clerk
	)	
v.	)	ORDER
	)	
NANCY J. DRAGANI, ACTING-DIRECTOR, OHIO DEPARTMENT OF PUBLIC SAFETY, ET AL.	)	
	)	
Defendants-Appellants.	)	

BEFORE: RYAN, SILER, and COLE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Cole would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

U. S. Const., Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

4301:1-1-52. Entertainment - prohibition against improper conduct.

(A) Definitions as used is this rule:

(1) "Disorderly activities" are those that harass, threaten or physically harm another person including threats or other menacing behavior, fighting, assaults and brawls or any violation as defined by the *Ohio Revised Code section* 2917.11.

(2) "Nudity" means the showing ofthe human male or female genital, pubic area or buttocks with less than a fully opaque covering; the showing ofthe female breast with less than a fully opaque covering of any part of the nipple and/or areola; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of the nipples and/or areola.

(B) Prohibited activities; no permit holder, his agent, or employee shall knowingly or willfully allow in and upon his licensed permit premises any persons to:

(1) Engage in any disorderly activities;

(2) Appear in a state of nudity;

(3) Engage in sexual activity as said term is defined in ORC Chapter 2907;

(4) Commit Public Indecency, as said term is defined in ORC Chapter 2907.

(5) Allow in, upon or about the licensed permit premises, or engage in or facilitate in, the possession, use, manufacture, transfer, or sale of any dangerous drug, controlled substance, narcotic, harmful intoxicant, counterfeit controlled substance, drug, drug paraphernalia, or drug abuse instrument as said terms are defined in ORC Chapter 2925.

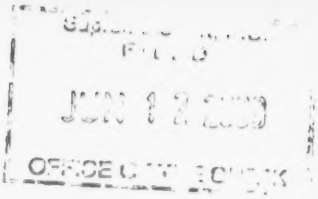
(6) Solicit for value, or possess, buy, sell, use, alter or transfer, or allow to be solicited, possessed, bought, sold, used, altered, or transferred for value USDA food stamp coupons, Electronic Benefit Transfer (EBT) cards, WIC program benefit vouchers, or other electronically transmitted benefits, in a manner not specifically authorized by the Food Stamp Act of 1977, or the Child Nutrition Act of 1966. A conviction or consent decree against the permit holder, its agent or employee for a violation of any of such acts constitutes evidence of a violation of this rule.

(7) Obtain or exert control over property or services of another, with purpose to deprive the owner thereof, without the consent of the owner or person authorized to consent, or by deception, fraud or threat. Nor shall any permit holder, his agent, or employee, use the licensed permit premises to receive, retain, or dispose or property of another, knowing or having reasonable cause to believe such property has been obtained through the commission of a theft offense.

(8) The prohibition set forth in subsection B(2) shall not apply to any individual exposing a breast in the process of breastfeeding an infant under two years of age.

(C) Severability - If any provisions of rule *4301:1-1-52 of the Ohio Administrative Code* or the application thereof to

any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the rule which can be given effect without the invalid provision or application, and to this end the provisions are severable.



No. 08-1144

In the Supreme Court of the United States

J.L. SPOONS, Inc.,

Petitioner,

v.

HENRY GUZMAN, DIRECTOR,
OHIO DEPARTMENT OF PUBLIC SAFETY, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do Ohio Liquor Rule 52's restrictions on nudity and sexual contact at liquor-serving establishments survive an overbreadth challenge because they do not reach a substantial amount of protected speech in relation to their plainly legitimate sweep?

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INTRODUCTION

At issue in this case is the type of reasonable regulation of nude dancing that this Court and others have repeatedly upheld. Ohio's Liquor Rule 52 ("Rule 52") restricts nudity and sexual activity in liquor-serving establishments. The Sixth Circuit properly found that Rule 52 is not unconstitutionally overbroad, thus rejecting a challenge by a group of strip-club owners led by Petitioner J.L. Spoons, Inc. ("Spoons"). Spoons now insists that the decision creates a circuit split and raises other issues worthy of this Court's review. Spoons is wrong, however, in large part because it mischaracterizes the scope of Rule 52.

Rule 52's nudity definition tracks virtually verbatim the anti-nudity provisions upheld in *Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991), and *City of Erie v. Pap's A.M.*, 529 U.S. 277, 284 (2000). And its definition of restricted sexual activity includes actual sex as well as "sexual contact," which includes "touching of an erogenous zone of another . . . for the purpose of sexually arousing or gratifying either person." Thus, Rule 52 does not prohibit any touching between two people that might arouse a third-party *observer*. Rule 52 restricts so-called "lap dances" in which a nude dancer touches a customer to gratify him—which is not protected First Amendment activity—but it does not restrict a ballet performance in which one dancer lifts another by the buttocks, because such "touching of an erogenous zone" is not "for the purposes of sexually arousing" either dancer.

Measured by a proper understanding of Rule 52's scope, then, Spoons's claims of conflict do not hold up. For example, Spoons claims that the Sixth

Circuit's decision below conflicts with an Eighth Circuit decision invalidating a law that prohibited certain contact "when such contact can reasonably be construed as being for the purpose of the sexual arousal or gratification of either party *or any observer*." *Ways v. City of Lincoln*, 274 F.3d 514, 516 (8th Cir. 2001) (emphasis added). The Eighth Circuit specifically found the "observer" language to be the problem "because constitutionally protected artistic expression may legitimately intend to titillate or arouse members of the audience." *Id.* at 520. That difference distinguishes this case not only from *Ways*, but also from every other case to which Spoons points. Nor is any purported conflict *within* the Sixth Circuit a cause for review.

The Sixth Circuit's overbreadth analysis here is fully consistent with this Court's First Amendment jurisprudence. As the appeals court correctly held, the "sexual contact" provision is not overbroad, because Ohioans may continue to enjoy ballet, ice skating, and performances of "high culture" works with sexual content, even in venues that sell alcoholic beverages. Further, Rule 52 does not affect full nudity or sexual contact at venues that do not serve liquor. Thus, the potential for affecting *any* protected expression is small, and it comes nowhere near a *substantial* amount, measured against the law's legitimate sweep—namely, restricting the nudity and sexual contact that occurs at strip clubs, not at the ballet.

Moreover, while the Sixth Circuit's general overbreadth approach is consistent with this Court's, the decision below is apparently the only one to consider overbreadth in the specific context of a law

with Rule 52's narrow focus. So even if there might be a need someday to consider how overbreadth applies to such laws, consideration should await further percolation in the lower courts.

Finally, Spoons mistakenly insists that review is needed so that Spoons can obtain, on remand, review of its as-applied claim. But such review on remand is already available, because the district court never reached that issue (nor, consequently, did the Sixth Circuit).

The Court accordingly should deny the Petition.

STATEMENT OF THE CASE AND FACTS

A. The Ohio Liquor Commission promulgated Rule 52 to help control the secondary effects of nudity and sexual activity in liquor-serving establishments.

The Ohio Liquor Commission promulgated the latest version of Ohio Administrative Code 4301:1-1-52, known as "Rule 52," to combat the undesirable secondary effects resulting from nudity and sexual activity at liquor establishments. Before promulgating the current version of the rule, the Commission first conducted a detailed review and analysis of studies and cases regarding nudity and sexual activity in places with a liquor license. They also considered testimonials from individuals with expertise in the area and experience in strip clubs and similar businesses. The Commission concluded that establishments with a liquor permit that also allow nudity and sexual activity are susceptible to undesirable secondary effects.

The Commission also conducted a public hearing on the subject of secondary effects as part of the rule-promulgation process under Ohio law. At this hearing, the Commissioners heard additional evidence regarding potentially undesirable secondary effects of nudity and sexual activity in liquor establishments. For example, among those testifying was Bruce A. Taylor, an attorney from Fairfax, Virginia, with experience in prosecuting vice crimes, including obscenity, prostitution, and liquor violations. *J.L. Spoons, Inc. v. Morckel*, 314 F. Supp. 2d 746, 749. Taylor stated that "nude dancing does contribute to its own type of secondary effects and to

a greater degree than other liquor bars that don't have nude dancing." *Id.*

Rule 52 generally provides that an establishment holding a liquor permit may not knowingly or willfully allow "nudity" or "sexual activity" on the premises:

> no permit holder, his agent, or employee shall knowingly or willfully allow in and upon his licensed permit premises any persons to . . .
>
> (2) Appear in a state of nudity;
>
> (3) Engage in sexual activity, as said term is defined in Chapter 2907 of the Revised Code.

Ohio Admin. Code § 4301:1-1-52 (B)(2) & (3) (2004).

"Nudity" is defined in section (A)(2), in language virtually identical to that analyzed by the Court in *Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991), and *City of Erie v. Pap's A.M.*, 529 U.S. 277, 284 (2000). In full, the section defines nudity as:

> The showing of the human male or female genital, pubic area or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple and/or areola; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast,

> which device simulates and gives the realistic appearance of the nipples and/or areola.

Ohio Admin. Code § 4301:1-1-52 (A)(2)(2004). This nudity definition is identical to the one upheld in *City of Erie*, except that it adds the words "and/or areola." Thus, Rule 52 bans, in liquor permit premises, nudity under the definition in *Barnes* and *City of Erie*.

Ohio law defines "sexual activity" as "sexual conduct or sexual contact, or both." Ohio Rev. Code § 2907.01(C) (2006). "Sexual conduct" is defined as intercourse or other actual sex acts. Ohio Rev. Code § 2907.01(A).

"Sexual contact" is defined as touching certain body parts for the purpose of sexual arousal or gratification of one of the individuals engaged in the touching:

> any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

Ohio Rev. Code § 2907.01(B). Thus, Rule 52 bans, on liquor permit premises, touching for the purpose of arousing or gratifying a party to the activity, but does not prohibit touching for the purpose of the arousal or gratification of an observer, or for any other purpose.

If a permit holder violates Rule 52, possible penalties include a fine against the liquor permit

holder or a revocation of the liquor permit. Violations of Rule 52 do not trigger any criminal penalties.

B. The district court invalidated Rule 52 as unconstitutionally overbroad under the First Amendment, but the Sixth Circuit reversed.

Three days before Rule 52 was scheduled to go into effect, Petitioners J.L. Spoons, Inc., et al., owners of "adult" clubs that feature nude or nearly nude dancers, sought declaratory and injunctive relief against the rule. Spoons argued that Rule 52 significantly burdens rights under the First and Fourteenth Amendments of the United States Constitution, both facially (as impermissibly overbroad) and as applied to its establishment.

At the hearings before the district court for the preliminary and permanent injunctions, Ohio offered testimony about its knowledge and experience dealing with the undesirable secondary effects associated with nudity and sexual activity at liquor establishments and supporting its basis for promulgating Rule 52.

The District Court granted Spoons's motion for preliminary and permanent injunctions of the nudity and sexual activity sections of Rule 52 and declared them unconstitutionally overbroad. See *J.L. Spoons, Inc. v. Morckel*, 2007 U.S. Dist. Lexis 74, *2 (N.D. Ohio 2007). The District Court did not rule on Spoons's as-applied challenge.

On appeal, the Sixth Circuit reversed, holding that Rule 52 is not overbroad. Pet. App. 2. The Sixth Circuit declined Spoons's petition for rehearing

and suggestion of rehearing *en banc*. Pet. App. at 720.

REASONS FOR DENYING THE WRIT

Spoons presents no issue worthy of review. Spoons's claims, both as to the need for review and the underlying merits of its claims, are based on misperception of both the Court's overbreadth jurisprudence and the narrow focus of Ohio's Liquor Rule 52.

First, the asserted conflicts between the circuits and within the Sixth Circuit do not exist, because the laws analyzed in the other cases all involve much broader prohibitions on nudity or sexual activity. As the Sixth Circuit recognized below, these other laws are a far cry from the closely-focused Rule 52.

Second, the Sixth Circuit's overbreadth analysis tracks the Court's teachings and does not call for review. While the Court may not have analyzed the nudity provisions in *City of Erie* and *Barnes* under the overbreadth doctrine, the Court's general overbreadth jurisprudence provides the courts—including the Sixth Circuit here—with ample guidance to evaluate Rule 52 and similar laws. Moreover, because only the Sixth Circuit has reviewed a law as narrow as Rule 52, the Court should await percolation of the issue in similar cases to see if review is ever warranted.

Finally, Spoons's request for certiorari to ensure consideration of its as-applied challenge is unnecessary. The district court did not resolve the as-applied challenge, and nothing in the Sixth Circuit's opinion eliminated it. The challenge

accordingly appears to remain live in the district court.

A. No division of authority exists among or within the circuits, because the alleged conflict cases involve laws broader than Ohio's narrowly focused Rule 52.

Spoons asserts that the Sixth Circuit's decision here conflicts both with cases from other circuit courts of appeals and with its own cases. But Spoons is wrong on both counts.

1. The alleged circuit split is illusory.

Spoons cites a handful of circuit cases that allegedly show that other circuits invalidate laws similar to Ohio's Rule 52. See Pet. at 17-21. But each of those cases involved much broader laws that restricted wide swaths of conduct protected by the First Amendment. Ohio's Rule 52, by contrast, narrowly restricts only conduct that gives rise to adverse secondary effects. The rule therefore has minimal, if any, effect on legitimate expression, and the Sixth Circuit's decision upholding the narrow provision is consistent with decisions invalidating much broader laws.

Perhaps the best example of the illusory nature of the claimed split is Spoons's reliance on *Ways v. City of Lincoln*, 274 F.3d 514 (8th Cir. 2001), as the broader nature of the law at issue there—and the court's reliance on the language distinguishing it from Rule 52—are indisputable. See Pet. at 21. Rule 52 defines sexual contact as "touching of an erogenous zone of another . . . for the purpose of sexually arousing or gratifying *either person*." (emphasis added.) The ordinance in *Ways*, by

contrast, defined sexual contact to include both kissing and touching of various body parts "whether covered or not . . . when such contact can reasonably be construed as being for the purpose of the sexual arousal or gratification of either party *or any observer*." *Id.* at 516 (emphasis added).

That last clause, barring contact that gratifies an observer even where neither touching party is so gratified, was the source of the problem for the Eighth Circuit. That court noted, "constitutionally protected artistic expression may legitimately intend to titillate or arouse members of the audience." *Id.* at 520. The court reasoned that audience members might find all sorts of performance gratifying, such that the law could reach ballet and ice skating performances. The law at issue was overbroad because it reached those forms of communication. Rule 52's "sexual contact" definitions, by contrast, cannot possibly reach such ballet performances, because the touching that occurs in those performances is not for the "purpose of the sexual arousal or gratification of either party." The rule therefore leaves intact any protected artistic expression intended to titillate or arouse *members of the audience*.

The Eighth Circuit in *Ways* also found problematic a provision that barred "simulated sex," and Ohio's Rule 52 has no analogous provision. The Eighth Circuit found that this provision "could have been enforced to prohibit the type of simulated sex to be found in productions of *Hair*" or in any artistic expression that involves "simulated sex." In sum, *Ways* does not conflict with *Spoons*.

Nor does the decision below conflict with the Third Circuit's decision in *Conchatta v. Miller,* which addressed a law banning "lewd, immoral, or improper entertainment." 458 F.3d 258, 261 (3d Cir. 2006); see Pet. at 18-19. That law, too, was far broader than Rule 52. As the *Conchatta* Court stated, the Pennsylvania law "has not been limited to proscribe *only* entertainment" that involves a narrow range of non-protected exposure or touching. *Id.* at 266. Thus, *Conchatta* cannot be considered "in conflict" with this case, because Rule 52 *has* been limited to proscribe *only* nudity as defined in *City of Erie* and *Barnes* and *only* activity that involves an actual sex act or sexual touching that gratifies one of the parties to the contact.

Spoons is equally mistaken in asserting a conflict between the decision below and the Fourth Circuit's decision in *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507 (4th Cir. 2002) (*Carandola I*). See Pet. at 19-20. The North Carolina law at issue there was not only broader than Rule 52, but was even broader in its sweep than the laws in *Conchatta* and *Ways*. The *Carandola I* law prohibited, without limitation, "any entertainment that includes or simulates sexual intercourse or any other sexual act," and "the touching, caressing or fondling of [various body parts]." *Id.* at 510. The court found that the broad limits on "touching" certain body parts, with no definitional restriction to touching for the gratification of anyone, performer or observer, left vulnerable "a ballet in which one dancer touches another's buttock during a lift." *Id.* at 516. The law in *Carandola I* also barred both "simulated sex" and "simulated nudity" under definitions that easily covered wide ranges of legitimate artistic endeavor.

Notably, North Carolina later amended the law invalidated in *Carandola I*, and the updated law was *upheld* by the Fourth Circuit, showing agreement between the Fourth and Sixth Circuits that a properly focused law in this area is not overbroad. See *Giovani Carandola, Ltd. v. Fox*; 470 F.3d 1074 (4th Cir. 2006) (*Carandola II*). In *Carandola II*, the Fourth Circuit noted that the "sexual contact" definition no longer covered "touching, caressing, or fondling," but was limited to "fondling," which the court read to "only bar[] a performer from actually manipulating specified erogenous zones." *Id.* at 1083 (internal quotation omitted). The court also noted that the amended law exempted performances in specified venues, such as "theaters, concert halls, art centers, museums, or similar establishments," when the performances presented in such venues are "expressing matters of serious literary, artistic, scientific, or political value." *Id.* at 1084.

While Ohio's Rule 52 does not express its limits in the same venue-based and artistic-value way that North Carolina uses, Ohio's restriction of the sexual-contact definition to touching "for the sexual arousal or gratification of either person" serves much the same function. After all, a ballet dancer does not seek to sexually arouse the other dancers he or she lifts, and so on. Thus, the Sixth Circuit's upholding of Rule 52 is consistent with the Fourth Circuit's invalidation of the broader law in *Carandola I*, and with its later validation of the narrower law in *Carandola II*.

Finally, Spoons is mistaken in claiming that the decision below "cannot be harmonized" with cases that upheld similar ordinances against overbreadth

challenges on the ground that those ordinances "confined [their] reach to adult entertainment establishments." See Pet. at 21, n. 8 (citing *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000); *J&B Entm't, Inc. v. City of Jackson*, 152 F.3d 362 (5th Cir. 1998); *Carandola II*, 470 F.3d at 1079). True, those cases said that such limits prevented overbreadth problems, but those cases never said that such a limit was the *only* way to prevent overbreadth. Therefore no conflict arises. And as noted above, the other limits in Rule 52 essentially serve the same function, so Rule 52 does *not* restrict ballets or other performances based on contact between performers that does not sexually arouse or gratify the performers.

In sum, Spoons fails to show a real conflict between the decision below and any decision from another circuit.

2. The alleged intra-circuit dispute is also illusory and would not warrant review if it existed.

Spoons also argues that review is needed to correct conflicts within the Sixth Circuit's own precedent, but that claim lacks merit for several reasons. First, this Court has never indicated that conflict *within* a circuit justifies a grant of certiorari. Rather, resolution of conflict within a circuit "is the dominant concern" of the en banc process. *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 270 (1953) (Frankfurter, J., concurring). Spoons sought en banc review, but the Sixth Circuit declined. This Court need not second-guess the Circuit's assessment of the alleged intra-circuit conflict.

Second, even if an intra-circuit split were worthy of this Court's attention, the alleged split here is illusory. As with the alleged circuit split, the cited Sixth Circuit cases deal with laws that broadly prohibited nudity and sexual conduct, in contrast to Rule 52's narrowly focused regulations.

For example, in *Triplett Grille v. City of Akron*, 40 F.3d 129 (6th Cir. 1994), the ordinance at issue prohibited *all* nudity "in a public place," not just at liquor-serving establishments. *Id.* at 131 n.2. Equally important, the *Triplett Grille* court found that the ordinance at issue made "no attempt to regulate only those expressive activities associated with harmful secondary effects and includes no limiting provisions." *Id.* at 136. Indeed, the ordinance was admittedly enacted because of moral outrage, rather than to control secondary effects.

Furthermore, *Triplett Grille*, like *Ways* and *Carandola I*, is analytically distinct because the panel there addressed overbreadth before *Virginia v. Hicks*, 539 U.S. 113 (2003). The court below also distinguished *Triplett Grille* based on its reliance on the concurrence by Justice Souter in *Barnes*, since placed in question by *City of Erie*. *Spoons*, 538 F.3d at 385-86.

The other cited Sixth Circuit cases are similarly distinguishable. The law at issue in *Odle v. Decatur County, Tenn.*, 421 F.3d 386 (6th Cir. 2005) prohibited not only nudity, but also "the performance of a wide range of arguably sexually suggestive acts," 421 F.3d at 392, including "simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or [other] sexual acts," *id.* at 394 (emphasis added). By contrast, Rule 52 does not

prohibit simulated acts. And *Hamilton's Bogarts v. Michigan*, 501 F.3d 644 (6th Cir. 2007), like *Odle*, addressed a law banning simulated sexual acts. *Spoons*, 538 F.3d at 386; *Hamilton's Bogarts*, 501 F.3d at 648-49. *Hamilton's Bogarts* offered only dicta on overbreadth, indicating that the overbreadth claim "appear[ed] to" be strong. *Id.* at 654.

In short, Spoons has not shown a genuine conflict among the circuits or within the Sixth Circuit with respect to a narrowly focused law similar to Rule 52. The Court should not grant certiorari on the grounds of inter- or intra-circuit conflict.

B. Review is not needed to apply overbreadth doctrine to laws upheld against different challenges in *Barnes* and *City of Erie*.

All agree that Rule 52 copied, nearly verbatim, the nudity definitions from the ordinances upheld against as-applied challenges in *Barnes* and *City of Erie*. And all agree that those as-applied decisions do not preclude Spoons or any other party from attacking Rule 52 or similar nudity restrictions under the alternate theory of an overbreadth claim. Spoons accordingly urges the Court to grant its Petition to complement *Barnes* and *City of Erie* by applying overbreadth to such laws. But no such complementary assessment is needed—not because *Barnes* and *City of Erie* have answered the question (they did not), but because the Court's general overbreadth law provides ample guidance. And even if it did not, this case does not justify a new look.

This Court recently clarified when a law's overbreadth is substantial enough to warrant facial

invalidity. In *Virginia v. Hicks*, 539 U.S. 113, 122 (2003), the Court reiterated that the overbreadth claimant bears the burden of demonstrating that the law, taken as a whole, is substantially overbroad, judged in relation to its plainly legitimate sweep. Other recent cases provide guidance for applying the same overbreadth rule in various contexts. *United States v. Williams*, 128 S. Ct. 1830 (2008) (statute criminalizing sale of child pornography not overbroad); *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1195 (2008) (ballot language law not overbroad); *McConnell v. FEC*, 540 U.S. 93, 206 (2003) (campaign finance law not facially overbroad).

The circuits have recognized the importance of *Hicks* and other recent cases and have, for the most part, correctly navigated the overbreadth doctrine in analyzing a wide range of laws and fact situations. See, e.g., *United States v. Schales*, 546 F.3d 965 (9th Cir. 2008) (federal laws regarding child exploitation and pornography not overbroad), cert. denied, 129 S. Ct. 1397 (Feb. 23, 2009); *United States v. Calimlim*, 538 F.3d 706, 713 (7th Cir. 2008) (forced labor law not overbroad), cert. denied, 129 S. Ct. 935 (2009); *Fla. Ass'n of Prof'l Lobbyists Inc. v. Div. of Legislative Info. Servs.*, 525 F.3d 1073, 1079 (11th Cir. 2008) (Florida lobbying law not overbroad); *Preminger v. Sec'y of Veterans' Admin.*, 517 F.3d 1299, 1318 (Fed. Cir. 2008) (law prohibiting demonstrations on VA property not overbroad); *Conchatta*, 458 F.3d 258 (3d Cir.); *Faustin v. City and County of Denver*, 423 F.3d 1192 (10th Cir. 2005) (Denver ordinance prohibiting signs on highway overpasses not overbroad); *Brazos Valley Coal. for Life, Inc. v. City of Bryan Texas*, 421 F.3d 314 (5th Cir. 2005) (Texas city sign ordinance

not overbroad); *Initiative and Referendum Inst. v. United States Postal Serv.*, 417 F.3d 1299 (D.C. Cir. 2005) (regulation preventing speech activities outside post office overbroad); *United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004) (federal law prohibiting material support to terrorists not overbroad); *United States v. Nenninger*, 351 F.3d 340 (8th Cir. 2003) (National Forest Service permit requirement not overbroad).

For its part, the Sixth Circuit has faithfully and properly applied the overbreadth doctrine in several recent decisions, including the decision below. See, e.g., *Connection Distrib. v. Holder*, 557 F.3d 321 (6th Cir. 2009) (en banc) (Child Protection and Obscenity Enforcement Act is not overbroad), petition for cert. pending, No. 08-1449 (filed May 20, 2009); *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008) (Ohio funeral-procession law not overbroad, citing *Hicks*); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 393 (6th Cir. 2005) (Kentucky school dress code not overbroad, citing *Hicks*). In this case, the Sixth Circuit specifically analyzed both the anti-nudity and the sexual conduct provisions of Rule 52 under *Hicks*. The court correctly recognized that the sexual conduct provision of Rule 52 is not overbroad because it has no application in "high culture" venues, as the prohibited touching "does not apply to contact done in furtherance of legitimate works of art for the purpose of conveying artistic meaning." Pet. App. at 10. And the court further found that the hypothetical "high culture" applications of Rule 52's anti-nudity provision do not constitute *substantial* overbreadth. *Id.*

The Sixth Circuit's overbreadth analysis was also correct—and Spoons and the dissent below are wrong—in assessing the number of non-"adult" Ohio venues that Rule 52 could affect. The dissenting judge and Spoons speculate, without concrete evidence, that 12,000-12,300 non-adult venues in Ohio would be "subject to" or "affected by" Rule 52. Pet. App. at 16-17 (Cole, J., dissenting); Pet. at 2, 10-11. Including in this estimated number, however, are countless venues—Progressive Field (née Jacobs Field), the Beachland Ballroom, and the Great Lakes Science Center, to name just three—that are unlikely, to say the least, to present live performances featuring nudity. See Pet. at 10-11; Pet. App. at 17. Instead, the real number of "high culture" venues in Ohio that might present live performances involving nudity is likely a tiny fraction of Spoons's asserted number.[1]

More to the point, Spoons and the dissent consider the wrong variable in the overbreadth analysis. Under the substantiality requirement, the relevant consideration is the universe of the law's *applications*, not of *venues*. In other words, courts must "compar[e] the number of valid applications to the likelihood and frequency of impermissible applications," *Gibson v. Mayor & Council of Wilmington*, 355 F.3d 215, 228 (3d Cir. 2004). As the Sixth Circuit itself recently noted, "[s]ubstantial overbreadth involves not just an inquiry into the

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[1] Spoons also exaggerates, without support, the application of a prior version of Rule 52 to high culture. The Commission's executive director testified that he "understood that there was a citation against the production *O! Calcutta* back in the 1980s sometime," Pet. at 11, but he apparently had no personal knowledge of this citation.

legitimate and illegitimate sweep of a statute; it also involves an inquiry into the 'absolute' nature of a law's suppression of speech." *Connection Distrib. Co.*, 557 F.3d at 340. In other words, a court should not look to venues where a certain type of speech might occur, but to the absolute amount of speech that is in danger of being suppressed.

Here, the permissible applications of Rule 52's anti-nudity provision overwhelm any arguably impermissible applications. The denominator here is large: Adult establishments feature nude performances on virtually every night of the year. The numerator, by contrast, is small: High-culture venues might host performances that contain nudity—such as the play *Equus*—for a week or two every five or ten years. These hypothetically impermissible applications of Rule 52 are too few and far between to constitute substantial overbreadth. Any "high culture" disputes under Rule 52, if they ever arise, should be resolved through concrete, as-applied challenges.

In short, the Sixth Circuit correctly analyzed both of Rule 52's provisions under the Court's jurisprudence, and the circuits have sufficient guidance from the Court on overbreadth analysis in a wide variety of contexts. The Court need not take this case simply because it did not analyze the anti-nudity laws in *City of Erie* and *Barnes* under the overbreadth doctrine.

Moreover, the Court should refrain from review of Rule 52's sexual conduct provision under the overbreadth doctrine until the lower courts have had more time to analyze similar laws. No other law analyzed by any of the circuits has the same limiting

provisions as Rule 52, that is, a law that prohibits sexual contact only when conducted for the gratification of *parties* to the contact, as opposed to an *observer*. The uniqueness of Rule 52's sexual conduct provision would make this a case of first impression, and the Court should therefore refrain from review at this time.

C. The Court should not grant certiorari to "revive" Spoons's as-applied challenge for remand, because that challenge remains alive—even if doomed by *Erie*—in the district court.

Spoons curiously insists that the Court needs to grant review so that it may revive its alternate as-applied challenge, whether in this Court or on remand in the district court. But that challenge seems to be alive and well, and Spoons points to no evidence that the Sixth Circuit cut it off.

Although the Sixth Circuit did not expressly include remand language noting the issue, no such express reservation was required. The district court enjoined Rule 52 based solely on the overbreadth challenge. Pet. App. at 53. As a result, the Sixth Circuit had before it only the overbreadth claim, on which it reversed. Such an unadorned reversal, with no comment either way as to the remaining, unadjudicated claims, by its nature returns the case to the district court to resume where it left off. Put another way, the Sixth Circuit did not instruct the district court to enter judgment for Ohio; it simply reversed an injunction.

Consequently, the as-applied claim is alive, if Spoons wishes to revive it. To be sure, it may be

uphill sledding, in light of *City of Erie* and Ohio's use of near-identical language. But procedurally, Spoons is free to try, and that is enough to rule this item out as a basis for this Court's review.

CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

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June 12, 2009

(3)

No. 08-1144

IN THE

Supreme Court of the United States

J. L. SPOONS, INC., *et al.*,

Petitioners,

—v.—

HENRY GUZMÁN, DIRECTOR,
OHIO DEPARTMENT OF PUBLIC SAFETY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The conflict between the decision below of the Sixth Circuit Court of Appeals and the established precedent of the Third, Fourth, Fifth, Seventh, and Eighth Circuit Courts of Appeals is not "illusory," as Respondents claim, but is authentic, unambiguous and in need of resolution by this Court.

I. THE DECISION BELOW CONFLICTS WITH THAT OF EACH CIRCUIT COURT OF APPEALS THAT HAS EVALUATED A REGULATION OF EXPRESSIVE NUDITY AND SEXUALLY SUGGESTIVE TOUCH UNDER THE OVERBREADTH DOCTRINE.

Until the Sixth Circuit's ruling here, every circuit court that has reviewed a law regulating expressive nudity and sexually suggestive touch in artistic, theatrical performances, not associated with adverse secondary effects, has concluded that such regulation is unconstitutionally overbroad. *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 135-36 (6th Cir. 1994); *Ways v. City of Lincoln*, 274 F. 3d 514, 519 (8th Cir. 2001) (ordinance found unconstitutional because it "was not tailored to combat" secondary effects and did not "exclusively cover conduct in adult entertainment businesses...."); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 515-16 (4th Cir. 2002) (liquor regulations found unconstitutional because they "[swept] far beyond bars and nude dancing establishments" and "reach[ed] a great deal of expression in the heartland of [the First Amendment's] protection" and no evidence existed to show that non-adult venues produced adverse secondary effects); *Odle v. Decatur County, Tenn.*, 421 F.3d 386, 395-96 (6th Cir. 2005) (same); *Conchatta v. Miller*, 458 F.3d 258, 268 (3rd Cir. 2006) (liquor regulations found

unconstitutional because no evidence produced to show their application to ordinary theater and ballet prevented adverse secondary effects associated with topless clubs); *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 654 (6th Cir. 2007) (observing without deciding that state liquor regulations were unconstitutionally overbroad because they proscribed "expressive conduct in theatrical and other type performances which there is no reason to believe had any negative secondary effects"); *See also Schultz v. City of Cumberland*, 228 F.3d 831, 849 (7th Cir. 2000) (finding ordinance was susceptible to limiting construction that confined its reach to adult establishments, thus saving it from fatal overbreadth).

In upholding the constitutionality of Rule 52, the court below disregarded the constitutional principle that courts of the other circuits–as well as prior panels in its own circuit–had agreed was required by the precedents of this Court.

As the dissent observed:

> [T]he majority has set itself apart from nearly every other court to consider an overbreadth challenge to a similar statute or regulation.

App. 28.

Respondents argue, however, that no conflict exists because, they maintain, the laws under review in the other cases "all involve[d] much broader prohibitions on nudity or sexual activity" than Rule 52's. Opp. at 8. As we will see shortly, Respondents are

just flat out wrong about this.

But perhaps more fundamentally, the underlying assumption of this contention–that whether a conflict exists here depends upon how closely the underlying regulations at issue in each case mirror each other in their definitions of nudity and sexually suggestive touching–is wrong. The holding of court after court reviewing regulations of constitutionally protected nude dancing or other sexually oriented performances, ***however defined***, is that such regulations may be upheld against an overbreadth challenge only if they are narrowly tailored to reach only performances and establishments shown to cause adverse secondary effects.

Here, it is undisputed that Rule 52 prohibits nudity (actually semi-nudity) and touching of erogenous zones in serious, artistic performances in thousands of venues not in any way associated with negative secondary effects. The court below acknowledged this. App. 11. But rather than striking down Rule 52 as unconstitutional under the rule of law followed by other courts, the Sixth Circuit upheld its restrictions on constitutionally protected speech, creating a clear and unambiguous conflict.

Moreover, as earlier mentioned, Respondents are sorely mistaken in the first instance that Rule 52 is more "narrowly" or "closely drawn" than the laws at stake in *Conchatta*, *Carandola*, and *Ways*. Opp. at 9-12.

At issue before the Third Circuit in *Conchatta* were state liquor regulations making it unlawful "for any licensee, under any circumstances, to permit in any

licensed premises or place operated in connection therewith any lewd, immoral or improper entertainment...." The Third Circuit emphasized that its determination that the liquor regulations were overbroad, was premised on the assumption that "lewd entertainment" proscribed no more than nudity or sexual touching. The court wrote:

> We need not here predict, however, how expansively the Pennsylvania courts might construe the prohibition because we conclude, in light of the broad array of forms of entertainment to which the prohibition is applicable, that even assuming the [regulations] proscribe no more than entertainment involving nudity or genital touching, those Provisions are unconstitutionally overbroad.

Id. at 266. Thus, contrary to Respondents' claim, the laws' proscriptions at issue in *Conchatta* as construed by the Third Circuit were far ***narrower*** than Rule 52.

While the regulations in *Conchatta* restricted nudity, Rule 52 prohibits, among other things, "the showing of...buttocks with less than a fully opaque covering" as well as a "device, costume or covering" that gives the appearance of nudity. And while the regulations in *Conchatta* restricted genital touching, Rule 52 extends to "any touching of an erogenous zone." Rule 52's prohibitions effect a greater intrusion into the presentation of artistic expression than the regulations struck down as unconstitutionally overbroad by the court in *Conchatta*

Similarly, the relevant provisions of the North Carolina statute and rule struck down as unconstitutionally overbroad in the Fourth Circuit's decision in *Carandola* had a much narrower sweep than their Rule 52 counterparts.

The North Carolina liquor regulations prohibited "the display of pubic hair, anus, vulva or genitals" and "the touching...of the breasts, buttocks, anus, vulva or genitals." *Id.* at 510. Again, both of its proscriptions were more closely drawn than Rule 52's, and both provisions were struck down as unconstitutionally overbroad.

Rule 52's prohibitions cut a much wider swath in regulating the content of mainstream theater and dance productions than those in *Carandola.* Not only do they prohibit the "display of pubic hair, anus, vulva or genitals" as the regulations found to be unconstitutional in *Carandola* did, but they prohibit a fully-clothed dancer from wearing a body suit that gives the appearance that he or she is nude, prohibit a performer in a beach scene from wearing a bathing suit that does not fully and opaquely cover his or her buttocks, and prohibit a performer from "dropping his drawers" for comedic effect.

Similarly, Rule 52 not only prohibits "the touching of breasts, buttocks, anus, vulva or genitals" as did the unconstitutional regulations in *Carandola*, but it prohibits a performer from romantically stroking his or her fellow actor's thigh in a love scene, restricts the sensual caresses of a flamenco dancer performing an alegría, and prohibits a dramatic scene of seduction from including any touching of buttocks, thigh, breast,

or any other potential "erogenous zone."

The same is true with regard to the ordinance at issue in *Ways*. That ordinance, struck down by the Eighth Circuit as overbroad, contained no proscriptions against nudity or semi-nudity as Rule 52 does. And thus unlike Rule 52, it posed no impediment to the presentation of mainstream, artistic performances such as *Equus* or *Wit*. For this reason alone, it was much less restrictive than Rule 52.

Moreover, the ordinance's prohibitions against "intentional touching of a person's sexual organ, buttocks, or breasts" and"kissing, when such contact [could] reasonably be construed as being for the purpose of sexual arousal or gratification of either party or any observer," *id.* at 516, were narrower than Rule 52's wide-ranging ban against touching another's erogenous zones–including "without limitation" the touching of a person's thigh or whatever other areas of the body might be considered erogenous zones–for the purpose of sexually arousing or gratifying either the performer or his or her fellow actor.[1]

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[1] Respondents argue that Rule 52's language defining conduct subject to its prohibitions as touching "for the purpose of sexually arousing or gratifying ***either person***," confines its reach and excludes protected artistic expression, in contrast to the regulation at issue in *Ways*. Opp. 10. The language of the regulation does not remove suggestive sexual touching in artistic theatrical or dance performances from its reach, however.

Without indulging in an esoteric examination of stage and dance, it nevertheless seems clear that a compelling and convincing performance of a love scene or balletic seduction requires its performers to experience and portray the emotions and physical reactions characteristic of those intimacies –such as

Nor do the Respondents' arguments bridge the gap in analysis between the decision below and that of the courts in *Schultz* and *J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362 (5th Cir. 1998). The courts in both those cases determined that the laws before them cleared the constitutional bar only because they could be interpreted as excluding serious, artistic performances from their regulation.

The Sixth Circuit's decision, therefore, conflicts with those of the Third, Fourth, Fifth, Seventh, and Eighth Circuit Courts of Appeals.

Indeed, the departure by the court below from the established precedent in its own circuit underscores the extent of the divide. Pet. at 22-28.

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arousal, stimulation, and gratification–bringing those performances within the ambit of the rule. See L. Strasberg, *A Dream of Passion: The Development of the Method*, (Little, Brown and Company 1987), pp. 164-65. ("The actor must be able to create not only the behavior, but the state of mind and the emotional experience of the character....If he knows how to create the proper sensory and emotional experiences which motivate and accompany the behavior of the character, he will be accomplishing the primary task of the actor: to act–that is, to do something, whether it be psychological or physiological.") And to the extent that some actors only imitate those responses, it puts law enforcement authorities in the precarious position of trying to determine which performer is actually aroused and gratified and which is not, *see e.g.*, Meg Ryan's infamous "I'll have what she's having" scene in When Harry Met Sally. http://www.youtube.com/watch?v=5nNhOH4Y0bI (last visited June 16, 2009)–a circumstance imbuing the authorities with a dangerous degree of unguided discretion.

II. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY, NOT AFFORDED TO IT IN *BARNES v. GLEN THEATRE, INC.*, 501 U.S. 560 (1991) AND *CITY OF ERIE v. PAP'S A.M.*, 529 U.S. 277 (2000), TO DECIDE ISSUES OF OVERBREADTH RAISED BY A REGULATION PROHIBITING EXPRESSIVE NUDITY.

Respondents contend that "review is not needed" to address the issue left open in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) and *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000): is a regulation of expressive nudity unconstitutionally overbroad when it applies to mainstream theater and dance performances?

Theaters, museums, theatrical producers, dancers and other artists who must decide whether to proceed with the presentation of a play or modern dance with abbreviated costuming or a scene of passionate lovemaking which, under a regulation like Rule 52, places the venue in which it is performed in jeopardy of having its license to serve alcohol revoked, would disagree. The thirty-one states and the host of county and municipal governments who have drafted similar regulations[2] would also disagree. And courts faced with trying to reconcile the irreconcilable–a circumstance created by the decision here–most certainly would disagree.

Moreover, leaving the decision below untouched, as Respondents urge, muffles the First Amendment rights of more than 11-million Ohioans and opens the door to similar censorial regulations in Michigan,

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[2] *See* Pet. at 4, n.1; 5, n. 2.

Kentucky, and Tennessee–states whose federal district courts fall within the Sixth Circuit.

The rule upheld by the court below restricts the presentation of constitutionally protected expression including dance, theater, political satire, comedy, and other performances in which the actors appear in abbreviated costumes or include sexually suggestive touching, in thousands of venues across the State of Ohio.

In their Brief in Opposition, Respondents claim that Petitioners' representation of Rule 52's broad scope and application is "without concrete evidence" and is exaggerated. Opp. at 18. Again, Respondents are mistaken.

Petitioners predicate their description of Rule 52's breadth on the testimony under oath of Respondents' ***own agents*** charged with the administration and enforcement of Ohio's liquor regulations. The Assistant Deputy Director of Operations for the Ohio Department of Public Safety, who is responsible for enforcing the State's liquor regulations, testified under oath that Rule 52 applied to every establishment holding a liquor permit in the State of Ohio–among which were roughly 12,000 venues where live entertainment could be presented. (Pohlman, Tr. at 159, 189-91; JA 224, 254-56).[3] The Deputy Director of the Ohio Department of Public Safety, who is "the CEO of the state law enforcement agency charged with law enforcement" of

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[3] The transcript of the proceedings in the district court is reproduced in the Joint Appendix filed in the court below at JA 66 to JA 371.

Ohio's liquor laws, likewise testified under oath that Rule 52 applied to all establishments licensed to sell alcohol and that the Rule prohibited performances in which a person appeared with "less than a fully opaque covering"on their buttocks or a "fleeting scene involving the exposure of a woman's aerola and nipple" in all such venues. (Duvall, Tr. at 31, 32, 37; JA 348, 349, 354). The Executive Director of the Ohio Liquor Control Commission, the administrative agency that wrote and promulgated Rule 52, testified under oath that it was "impossible to have a rule" that excepted serious, artistic entertainment, and that he was "aware of" a citation against the production of *Oh! Calcutta!* in the 1980s. (Anderson, Tr. at 225-26; JA 290-91).

As for the broad range of artistic and serious live entertainment restricted by Rule 52, Petitioners' expert, Dr. Judith Hanna identified a number of examples of performances that would be eliminated or restricted by the rule:

> [T]here's a ballet called *Prodigal Son* that is done by a number of our major dance companies. And in *Prodigal Son*, the young man is seduced by a siren, and she has him put his hand on her breast and on her crotch. And I mean, that would be one example.
>
> Another example would be Paul Taylor's modern dance, *Big Bertha*, which is about a dysfunctional family. It starts out with the dancer turning on [a] [n]ickelodeon, and it plays through, including the father molesting the daughter and committing

incest. So you see that on stage.

In the theater you have *Oh! Calcutta!* where you have male and female completely nude touching. So you have groupies and you have partners, you have–nudity is a tradition in the arts. In ballet it goes back to 1840. And in the '60s you had a big florescence of nudity on stage. The Rainier Trio in the 1960s did a performance where the dancers were all nude, and they had American flags around their neck[s], and it was communicating messages of censorship.

There were, for example, in the nation's capitol Bilty Jones did a performance called *Still There* –no it was *Uncle Tom's Cabin.* I forget the exact title. But there were 50 people on stage. There were members of his company, there were members from his community. So you had tall and short, and you had fat and thin, and you had people of all different colors and all different gender orientations, and the message was to convey the common humanity of man.

In terms of touch in theater, Tennessee Williams [in] *A Streetcar Named Desire*, where Blanch, who was a prostitute but is putting on pretension of high class, is assaulted by her brother-in-law.

(Hanna, Tr. at 25-26, JA 90-91.) To this list of productions that would be barred by Rule 52, Dr. Hanna

also added Sam Shepard's play, *Buried Child*; the musical, *Hair*; the drama, *Equus*; the ballets, *Mutations* and *Fuga*; and the performance art in *Puppetry of the Penis*. *Id.* at 26-29, JA 91-94. Ballroom dancing performed before an audience such as the tango and salsa would also be restricted by Rule 52's prohibitions. *Id.* at 26, 30; JA 91, 95.

Rule 52's application to thousands of venues where legitimate, mainstream entertainment is offered and its choke-hold on a large and vital body of artistic expression was meticulously demonstrated by the evidentiary record. It captures a substantial amount of vibrant and important expression within its noose. The decision of Sixth Circuit Court of Appeals upholding Rule 52, therefore, merits review and reversal under the First Amendment by this Court.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, certiorari should be granted.

Respectfully submitted,

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